OVERSIGHT ON THE OPERATION OF THE BOARD OF VETERANS APPEALS AND THE U.S. COURT OF VETERANS APPEALS

HEARING

BEFORE THE

SUBCOMMITTEE ON

COMPENSATION, PENSION AND INSURANCE

OF THE

COMMITTEE ON VETERANS' AFFAIRS

HOUSE OF REPRESENTATIVES

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OVERSIGHT ON THE OPERATION OF THE BOARD OF VETERANS APPEALS AND THE U.S. COURT OF VETERANS APPEALS

THURSDAY, OCTOBER 4, 1990

House of Representatives,
Subcommittee on Compensation,
Pension and Insurance,
Committee on Veterans' Affairs,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 334, Cannon House Office Building, Hon. Pete Geren presiding.

Present: Representatives Evans, Penny, Geren, McEwen and Bilirakis.

OPENING STATMENT OF HON. PETER GEREN, ACTING CHAIRMAN

Mr. **Geren**. Good morning, ladies and gentlemen. The subcommittee will come to order.

We are meeting this morning to hear testimony from the Department of Veterans Affairs and veterans service organizations on the operation of the Department's Board of Veterans Appeals and the United States Court of Veterans Appeals.

Regrettably, we will not be hearing from the Chief Judge of the Court today, but I have received documents from Judge Nebeker which address some aspects of the Court's operation. I will include a copy of a letter from Judge Nebeker dated September 12, 1990, with its enclosures, as well as Chairman Applegate's reply to the judge on October 1, 1990. Chairman Applegate has advised the Chief Judge that we may well direct written inquires to him as a follow up to today's hearing.

[The documents appear at p. 33.]

Mr. **Geren**. Since our last oversight hearing on the BVA on June 14, 1989, the Board has taken aggressive action to reduce its response time on appeals, from a high point in December, 1989 of over 230 days, to approximately 145 days as of this past August. This is a truly remarkable turnaround and the Chairman and Vice Chairman should be commended, especially in light of the fact that there has been a considerable turnover in the legal staff and unfilled vacancies among Board members.

The obvious question that comes to mind in light of this dramatic improvement in timeliness is whether the quality of decisions has suffered. Hopefully, our witnesses today will be able to address this concern.

In regard to vacancies on the Board, I want to note that it has been nearly 2 years since the Congress mandated that a Chairman be newly nominated and confirmed by the Senate. Only in recent days has a nomination been submitted to the Senate for confirmation. This has prevented the nomination of any other Board members to fill vacancies and ignores the statutory requirement that all of the Board members be nominated and confirmed by the Senate.

The President has nominated Mr. Charles Cragin to be the new Chairman of the Board, but it is extremely doubtful that the Senate will be able to act on his nomination this session.

Why has it taken the administration nearly 2 years to comply with the law? I don't expect any of you here today to be able to answer that question, but it is one that is very troubling to the subcommittee.

I look forward to hearing from each of our witnesses and I thank each of you for your participation in the hearing.

Before we begin, I want to take just a moment to convey my personal best wishes to Ken Eaton, the very able Chairman of the Board of Veterans Appeals. As you all are probably aware, Mr. Eaton is waging a battle with a very serious illness, but I understand he's making very good progress. I am certain everyone in this room would join with me in wishing him the very best. Our thoughts and prayers are with him.

Our first witness this morning is the fine Vice Chairman of the Board, Mr. Roger Bauer, who is certainly no stranger to the subcommittee. He is accompanied today by Mr. Jack Thompson and Mr. Barry Tapp, who represent the Office of General Counsel.

If the panel will indulge us for just a moment, I would like to recognize Mr. McEwen for his opening statement.

OPENING STATEMENT OF HON. BOB MCEWEN

Mr. McEwen. Thank you, Mr. Geren.

Of course, I welcome the follow up of this second year of hearings on how best to handle veterans appeals and the working of the new Court.

It is my understanding that representatives of the Court are not here. That, of course, would be disappointing, if that's the case. But for those who are here, we are delighted that you are and look forward to your testimony as to how we can better accomplish what all of us have dedicated our lives to, and that is making sure our veterans are adequately compensated and treated for the injuries for which we have made provision in law.

With that, I have a statement, Mr. Chairman, that I would like to insert into the record. Thank you very much.

[The prepared statement of Congressman McEwen appears at p. 111.]

Mr. Geren. Thank you, Mr. McEwen.

I would now like to recognize Mr. Roger Bauer. I appreciate your being here today. You may proceed when you're ready.

STATEMENT OF ROGER K. BAUER, VICE CHAIRMAN, BOARD OF VETERANS APPEALS; ACCOMPANIED BY JACK THOMPSON, ESQ., AND BARRY TAPP, ESQ., OFFICE OF GENERAL COUNSEL

Mr. BAUER. Thank you and good morning. I spoke to Mr. Eaton this morning and he extends his regrets that he was unable to be here to present this testimony. I'm sure he will appreciate your kind remarks about him.

This morning I would like to address the several issues that the committee I am sure is interested in regarding the timeliness of the Board's decision process, the quality of those decisions, the impact of judicial review, and the staffing implications of these various areas.

Let me start with the timeliness and efficiency initiative which we began last year, prompted by the rising response time in entering Board decisions.

Let me start by defining what response time is and what we use it for. Basically, it is a gauge to determine how long it will take the Board to enter decisions on a particular group of decisions. For example, the formula used is made up of the number of decisions which we plan to come in, the backlog, divided by the number of decisions which we can enter in a day. This gives us the number of days it will take to enter a particular process for a particular group of decisions. For example, if there are 100 decisions and you were doing ten a day, it would take you 10 days to go through the lot.

Now, the two factors that affect this are the number of decisions that come in and, of course, the number of decisions that go out. We can affect the number of decisions which we enter. We cannot affect the number of appeals that come in, but we do enter pretty good estimates as to what we're going to see.

As I indicated, at the beginning of this fiscal year, it was a shared decision between Department and BVA officials that the growing response time needed to be brought down to a more reasonable level.

Now, what did we do? We cut the amount of professional staff time devoted to other matters, other than decision production. Examples of this would be the index review procedure, indexing, less detail, some cutback in the number of attorneys devoted solely to quality review. We authorized, in accordance with the law, two-signature decisions where there was a Board member vacancy or absence. In other words, we minimized the use of acting Board members.

We developed abbreviated decision formats, using computers to enter routine language. For example, the section of the decision where the applicable law is set out, that would all be done with computer format. We also introduced automation in case handling, such as bar coding, and we procedurally streamlined our administrative functions at the Board.

Finally—and it cannot be ignored—we put in a lot of sweat, particularly on the part of the Board members, who devoted many hours of time, uncompensated, to accomplish this result.

And what was that result? Well, as we noted, by the end of August we had dropped our response time to almost 145 days. This was down from a 238 day high in the previous December, December of 1989. We increased our productivity by 20 percent in comparison with fiscal year 1989. We expect our decision output for fiscal year 1990 to be almost 47,000 decisions, higher than any year since 1955. In 1989, we entered 38,673 decisions, so that is quite a jump.

For example, in 1989, we entered 93 decisions per full-time employee equivalent. In 1990, it appears that we will be entering approximately 116 decisions for every full-time employee equivalent at the Board.

Now, as to the future, since we accomplished our time reduction initiative within a year, as opposed to the 2 years according to the plan, we will be able to devote more time to decision quality. Decision quality is of concern but, of course, quality is a subjective matter and, like art and pornography, we all know when we see it, but everyone differs as to what it is.

We will be able, with the budget that is being provided in the House version, to improve our quality, direct resources towards additional quality, reduce the number of two-signature decisions, and strengthen our discussion and evaluation portion of the decision.

Judicial review has brought some additional work for us. Attorney fee arrangements, additional liaison with the Court of Veterans Appeals and the General Counsel, and administrative work elements. We have additional issues relating to workload elements, travel and other matters.

As I see my time is running out, I will end my statement and address any questions you may have for me.

[The prepared statement of Roger Bauer appears at p. 115.]

Mr. Geren. Thank you, Mr. Bauer.

I hope you're not suggesting that the quality deserves an "X" rating.

[Laughter.]

I certainly appreciate your turnaround in BVA response time, but could you address the issue of quality? Do you believe that, as an agency, perhaps you're overemphasizing productivity at the cost of quality, and what steps are you taking to ensure that that doesn't happen?

Mr. Bauer. Well, I think we would have to admit, first of all, that there is a tradeoff in quality versus productivity. Where you draw the line is, of course, a matter of judgment.

Frankly, we do measure—We have indicators as to quality. We look at, for example, the substance of the reconsideration requests, how many seem to have apparent merit. We look at your mail from Congress as to what you're seeing and observing and complaining about. We have our formal quality review system and we pick up errors through that, and we can measure that. We have feedback from the Department of Veterans Affairs regional offices and we see that. Of course, now we have a new measure, and that is the decisions entered by the Court of Veterans Appeals.

Mr. Geren. Could you tell me what percentage of decisions are now signed by only two members, and is that percentage increasing or decreasing?

Mr. Bauer. We would guess at this point in time that approximately 50 percent of the decisions of the Board of Veterans Appeals are signed by only two members. In the future this, of course, will decline, should the full complement of Board members be appointed. We would expect down the line that it would only be 15 to 20 percent of the decisions with a full complement of Board members.

Mr. GEREN. You tell us your decision volume for fiscal year 1990 is 46,500, and the response time is 145 days, but the record shows that 34,690 and 192 days for the first three quarters.

How do you reconcile the differences in those two numbers?

Mr. BAUER. I think what we're looking at are two different measures, response time and elapsed processing time. In the beginning of my testimony I defined response time. Response time is that number of appeals waiting to be decided, divided by the number that you can produce each day. That is a future index and it tells you how long it will take to get through that pile of decisions.

The elapsed processing time is a measure taken from a specific time, say the time the notice of disagreement is filed or, in this case, the time the appeal reaches the Board to the time a decision is entered. So that 192 days reflecting the first three quarters shows what we actually did and takes in, back in January when it was 238 days.

Mr. GEREN. Why does it take 6 months for certification of an appeal to the Board after receipt of the veteran's substantive appeal?

Mr. BAUER. Six months from the time of the substantive appeal to certification of the Board? That is in the regional office. That area is not under the control of the Board directly, but I can give my opinion as to why it's taking so long.

For one thing, you have hearings that are conducted in the field. That's in that period of time. Then you have—I would say that's a substantial portion of that period of time, the hearing in the field that many of these cases would undergo.

Mr. GEREN. Thank you.

I would now like to recognize Mr. McEwen.

Mr. MCEWEN. How many vacancies are there on the Board presently, Mr. Bauer?

Mr. BAUER. I believe there are 11 unfilled Board member positions.

Mr. MCEWEN. I beg your pardon?

Mr. BAUER. Eleven.

Mr. MCEWEN. Eleven are vacant?

Mr. BAUER. Correct.

Mr. MCEWEN. What is the average number of days for processing an appeal?

Mr. BAUER. The response time—We use two measures, as I said. The response time, the time projected to now get through an appeal would be around 145 days at the Board. That's just the time at the Board, not field time.

Mr. MCEWEN. Well, okay. Let's add the field time. What's that?

Mr. BAUER. Well, it indicates, from the statistics I have, from the time of the notice of disagreement to the statement of the case, for the first three quarters of fiscal year 1990, it was running 488 days—I'm sorry. I'm reading off the wrong line.

From notice of disagreement to statement of the case, 61 days; statement of the case to substantive appeal, an additional 59 days.

Substantive appeal to certification, 176 days. Those are all field times. You add those three figures. If you totaled those three figures, you have what time it's in the field.

Mr. McEwen. So it's what, 300?

Mr. Bauer. Approximately.

Mr. McEwen. What if you added the time spent on remanded appeals?

Mr. Bauer. Well, as you may know, there was a General Accounting inquiry on that. The figure that we show, using their formula, is 44 days. I'm not sure that really gives you any good picture as to what's really happening.

Mr. McEwen. So if we have an average of a year, it's not unexpected that a good half of them are more than a year?

Mr. Bauer. Well, it probably would total out somewhere close to 500 days at this point, which is over a year.

Mr. McEwen. Can you give me some idea of what you think ought to be done?

Mr. Bauer. I would hesitate to comment on that element of the agency over which I have no authority or control. I can say at the Board I believe we have brought it down anywhere in the 150-day range, which I believe is reasonable at the Board.

As to the field, they have their own particular problems, and I believe the Chief Benefits Director would be in a better position to comment on that.

Mr. McEwen. Well, I'm going to introduce a bill that would hopefully speed up the processing of claims. It's called the Administrative Equity Act of 1990 and it would help us get a handle on these things. It would mandate that the claim would automatically be adjudicated unless there was action to the contrary by the VA. It would provide for the payment of interim benefits to claimants in cases where no action had been taken.

Do you see any problem with that?

Mr. Bauer. I haven't had an opportunity to read your bill. As it affects the Board, I don't know what the impact would be directly. As to the overall need to ensure promptness in the disposition of cases, it's a complicated picture, as you can realize. It's a matter of resources and what you can bring to bear in making an intelligent decision which is fair to both the veteran and the public in general.

Hasty decisions that are prompted by just the requirement to move them out I think could be detrimental, in the sense that you would be paying unwarranted benefits in some cases and perhaps cutting out deserved benefits in others through the hasty preparation of the decision process.

I believe the solution would be to look at some of the things that we have done at the Board—better automation, the increased use of automation, using high-quality personnel, and motivating your people.

Mr. McEwen. Mr. Bauer, theoretically we've been doing that, and every time I have asked—I always ask the same question at every hearing, how long does it take, and it's always "we're getting new computers, getting more people, and we're getting all these good things." Yet, we're getting further and further behind.

Mr. **Bauer**. I can only testify as to the Board of Veterans Appeals, and I can assure you, from what we've submitted to you, we have——

Mr. **McEwen**. I don't want to argue. I'm just trying to get some motivation on the side of doing something. You see, people like to pick on politicians a lot, and, brother, we've got a hammer that comes down on our head if we don't perform. I mean, there's a person not the least bit reticent to stand up in the middle of the room and say, "I wrote you a letter 6 weeks ago and I never heard from you, Congressman. How come?" It spurs us, you know, somewhat, like when the whole room says, "well, you're not going to be here next year, so you can write to somebody else." It keeps you on your toes.

I'm not real sure what the motivation is to get these things rolling. I'm not sure at 4 o'clock, when people get up and go home and get on the beltway in their car pools, as to whether or not those claims that were sitting out there from Cincinnati were 6 inches deep or 7 inches deep, as to whether or not they were impacted.

I don't want to be critical, but I'm just frustrated that it's not getting any better.

Mr. **Bauer**. I can sympathize, but I can tell you from my own experience at the Board, if you walk down the halls of the Board, the claims folders are knee-deep. There are bins of cases everywhere. There's no room for them. We are doing our darndest. I can tell you our employees are motivated and doing a heck of a job.

Mr. **McEwen**. Yes, I know, and lots of them are. So that leaves us where we are.

Who wants to comment on why the Court of Veterans Appeals wouldn't come talk to us? Mr. Thompson, you're a lawyer. Why don't you just give us a general explanation as to why, when we establish a court, and we want to see how it functions, it's our creation, we appoint the guys, and then they're too important to talk to us.

Mr. **Thompson**. With all due respect, Congressman, I wouldn't touch that with a ten foot pole.

[Laughter.]

You know, I imagine—I'm not even privy to what communications there have been between the committee and the Court.

Mr. **McEwen**. Let's flesh out the record a little bit. We invited them to come to tell us how the implementation is going, how it's working. The last thing we're going to do in a committee hearing is discuss cases or tell them what to do. I mean, they don't need to get jumpy about that.

It's our oversight of the Court, we established it, and we can do away with it. We want to know whether or not it's functioning. And yet, once the guy picks up his robes, he's gone. I'm disappointed that Judge Nebeker has declined to give us some explanation as to what's going on over there. I understand.

Thank you very much.

Mr. **Penny** [presiding]. I know that Mr. McEwen was trying to get at the delay at the local or regional level. It seems to me we're making progress at the Board of Veterans Appeals, but it may be moving in the other direction prior to those appeals reaching this level.

If I missed it, I apologize, but is there something you can identify as the cause of those delays, and is there a difference from State to State or region to region as to what might be causing that longer spread of time and a determination being made at the local level before things are bumped up to the Board?

Mr. **Bauer**. Well, some of the delay in the field, as I indicated earlier, is due to hearings that are conducted in the field, the delay of scheduling hearings.

Mr. **Penny**. Is it a staffing problem in just the processing?

Mr. **Bauer**. I'm really not in a position to comment as to VBA staffing or regional office problems, frankly.

I can say that what we see is basically the hold up would be, in part, due to hearings. Some of it may be due to requests by the appellant to submit additional evidence, supplemental statements of the case and this type of thing that does go on.

Mr. **Penny**. I'm just looking at the chart here to get the flow on the number of appeals. The increase, at least through 1989, seemed to be steady. For three quarters in fiscal year 1990, we were running at a rate that appeared to slow just a little bit. Am I wrong in that? What do you have?

Mr. **Bauer**. Our projection is that it will be very slightly over what we had projected. We had projected, I think, about 43,400 or something like that. We probably will wind up with about 45,000 on the year. We don't have a final count yet. We are anticipating that we will actually enter decisions on close to 47,000, putting a dent in the backlog.

Mr. **Penny**. The decision time at the Board level has been dramatically improved. What additional progress can be made once those 11 vacancies are filled?

Mr. **Bauer**. Frankly, that won't help us in response time. What it will do is allow us to enter decisions with three Board members participating in the decision rather than two Members, which is frequently the case now. So as far as productivity——

Mr. **Penny**. You don't see a productivity improvement based on filling out the Board; just a spreading of the responsibility a little bit?

Mr. **Bauer**. You might call it quality issue. It gives another individual a chance to review that decision and participate in it.

Mr. **Penny**. We have about a thousand cases so far that have been appealed to the Court?

Mr. **Bauer**. That's pretty close. That's my understanding.

Mr. **Penny**. Speaking from the Board's perspective, how do you view the process at the Court level in terms of their judgment on the cases in which you have made an earlier determination, and what role, if any, do the Board or attorneys on behalf of the Board play in those court proceedings?

Mr. **Bauer**. Let me answer the last part first. What you have at the Board—In our participation at the Court proceeding, there are certain ministerial acts, sealing the record, certifying the correctness of records, certain liaison activities with the General Counsel's office, Mr. Tapp's group, which takes the Department's position in the proceedings before the Court.

Basically, that type of activity is what we are involved in. We do not have any direct contact with the Court or the judges of the

Court, nor do we have any direct role in their decision making process.

As to what we've seen so far, there hasn't been all that much come down from the Court——

Mr. **Penny**. How many rulings have they made so far? Somebody gave that statistic earlier.

Mr. **Tapp**. Specifically, in terms of the number of cases on the merits, I think they have ruled on about seven cases.

Mr. **Penny**. Only about seven?

Mr. **Tapp**. Seven cases on the merits, the substantive merits of the cases, whether or not the factual determination made by the Board was clearly erroneous in several instances. A number of other cases have dealt with procedural issues, whether or not the case should be dismissed because of jurisdictional defects in the appellant's pleadings.

Mr. **Penny**. Did they remand to the Board any cases?

Mr. **Tapp**. No, they have not remanded any cases. There was one case that was reversed. All the other cases that have come before the Court, considering the merits—whether or not error occurred before the Board—have all been affirmed. In the one case that was reversed, we have asked the Court to take another look at that case. We have filed a motion for reconsideration in that particular matter.

Mr. **Penny**. So there has only been one instance to date where the Court has reversed a Board decision, and all other actions by the Court to this date have been either procedural decisions or some other type of decision but not a reversal of the Board.

Mr. **Tapp**. Not a reversal, right.

Mr. **Penny**. I don't have any further questions.

I think I share the concern of Mr. McEwen, that we have made a lot of headway with the Board of Appeals and hopefully, when that Board is filled out, we'll have an even better situation. But it seems that we may have to take a look down to the lower level to speed things along there. We're going to have to review a little more carefully just what the restraints are at that level, whether it's staffing or equipment or procedural, to see if we can't make some improvements there.

It doesn't help us a lot if we see a 70-day improvement in the turnaround once it reaches the Board of Appeals and see most of that time being lost because we're losing ground at the front end. Our objective isn't being achieved if we don't have a net improvement. So I think that may be the next mission for the committee, to take a look at our regional staffing and turnaround time.

I'm going to dismiss this panel and we're going to call forward the veterans' groups for their—I'm sorry, Mr. Bilirakis. My apologies.

Mr. **Bilirakis**. Just very quickly, Mr. Chairman, because I did come in late. I have just a generic question or point, if you will.

Mr. Bauer, do you plan to stay for the testimony of the veterans' organizations, or any one of the three of you from the VA?

Mr. **Bauer**. I will have someone here to hear their testimony.

Mr. **Bilirakis**. I know quite often the officials of the VA has stayed and listened to the testimony, and I have oftentimes wondered if maybe we aren't sort of the "tail wagging the dog", if we shouldn't put on the veterans' organizations first and hear their complaints and then have the VA come in and respond to them.

Have you had an opportunity to read their testimony? Has it been furnished to you ahead of time?

Mr. **Bauer**. I just picked them up this morning.

Mr. **Bilirakis**. Well, we can't direct you, but I would hope that you would have someone here who will really take good notes and possibly get back with you on some of their points. It would be very interesting if maybe you could respond to some of those in writing to this committee, if that's all right, Mr. Chairman. I would ask unanimous consent that they might respond to some of the testimony heard from the veterans' organizations to us. I would be interested in specific responses to specific questions.

Mr. **Penny**. We have followed that procedure in the past, and if Mr. Bauer has other commitments, as he implied he might, if others from the VA could stay in the event that we might want to ask some follow-up questions later, we would appreciate that.

Mr. **Bilirakis**. Thank you, Mr. Chairman. Thank you, Mr. Bauer.

Mr. **Penny**. Mr. McEwen indicates he had some additional questions.

Mr. **McEwen**. Two questions.

What is the main cause for the rapid turnover of attorneys?

Mr. **Bauer**. Aside from the normal attrition, the high number of departures from the Board, in that most of them, or an inordinate number of them, are coming from our senior attorney ranks and several from the Board itself, I believe related to the judicial review bill provisions regarding terms for Board members. Since the terms put Board members at a disadvantage compared to any other civil servants in a similar situation, in terms of retirement and employment security, many of our senior and better people view the Board appointment as not as desirable as other positions in or outside of Government.

This has led a number of people to leave. It is a matter in which we're greatly concerned and are working with General Counsel on possible solutions.

Mr. **McEwen**. I'm talking about staff attorneys.

Mr. **Bauer**. Senior staff attorneys are affected by this because they do not view the Board appointment, which has traditionally been the cap of a career at the Board, as a——

Mr. **McEwen**. They just hang around to get on the Board.

Mr. **Bauer**. Correct.

Mr. **McEwen**. Okay.

You have one part-time medical adviser. Is that enough?

Mr. **Bauer**. Actually, I have six others that I use as acting Board members, and should be Board members, but for the fact of this situation where we cannot get anyone appointed until the new Chairman is appointed. So there are other medical advisers available.

But taking it down the road, should these positions be filled, do I need other medical advisers in addition to the one I have? There might be some room, but I certainly don't need a large number since we do have the Board member physicians themselves available.

Mr. **McEwen**. What is the great cause of remanded cases?

Mr. **Bauer**. We remand primarily for either due process deficiencies that have occurred in the field, or even more likely, evidentiary development that we believe should be conducted before a final decision is entered.

Mr. **McEwen**. Do you choose the physicians, or who does?

Mr. **Bauer**. The physicians at the current time, under the old law, were selected off a civil service register. Under the new judicial review bill, they become excepted service personnel like attorneys in Government and can be appointed directly.

Mr. **McEwen**. When a veteran feels that he's absolutely ignored by a physician, can barely communicate with him—the physician takes his pulse and his heart beat and tells him his legs are fine and sends him out the door—what recourse does the veteran or a Congressman have?

Mr. **Bauer**. If you're talking about a physician who has examined the veteran in the field at a VA facility, and that is the evidence before the Board, if the findings reported by that physician are important to the outcome of that particular appeal, that would be a situation where we would remand and ask for additional development in the form of another examination.

Mr. **McEwen**. Do we send that to you?

Mr. **Bauer**. You send it to us, and if we do not feel that it is important to the outcome——

Mr. **McEwen**. What do I do? When he has gone to the Board of Appeals, he has gone to Indianapolis or wherever, and he is run through the sausage maker—the same guy's got the same report for all of them—they don't talk to him, they don't look at his case, they don't do anything. What do I do?

Mr. **Bauer**. We should be able to explain to you—If we don't develop it further, we should be able to explain to you why those findings, or why that particular examination is not important to this particular issue that's before us. We should be able to explain that.

Mr. **McEwen**. The veteran can request an independent medical opinion?

Mr. **Bauer**. He can make a motion to the Board.

Mr. **McEwen**. I'm just asking, what do I do? When I know this is taking place, and the VA has its folder here that says the guy can run in the Olympics, and he's sitting here in front of me and he's crippled, three times it says the guy's fine. What do I do about that?

Mr. **Bauer**. When the VA physician in the field says he's fine?

Mr. **McEwen**. Yes.

Mr. **Bauer**. I would enter an appeal and have the man show up, because if we can see him and see the same thing you're seeing, we'll tend to allow it.

Mr. **McEwen**. We're doing exactly that. He went to Indianapolis, his wife drove him over there. He spent less than 5 minutes with a physician who was less than courteous or communicative. Now I'm at a loss. I don't know what else to do.

Mr. **Bauer**. Has he been before us?

Mr. **McEwen**. Yes.

Mr. **Bauer**. He appeared and actually we were able—Now, it's difficult to discuss individual cases because you never know what the exact issue is before you. Sometimes that gets confused. A man is severely disabled and all of his disabilities are not pertinent to the case before you. So it can be confusing. He can look in terrible shape, and he is. But it doesn't affect the outcome of that particular decision.

Mr. McEwen. I understand that. So I really don't have much recourse.

Thank you.

Mr. Penny. I thank this panel. We're going to move on to the second panel for this morning.

I call forward John Bollinger, Paralyzed Veterans of America; Richard Schultz, with the Disabled American Veterans; Bob Manhan from the VFW; and Phil Wilkerson with The American Legion.

John, we will start with you. Glad to have you with us.

STATEMENT OF JOHN C. BOLLINGER, ASSOCIATE LEGISLATIVE DIRECTOR, PARALYZED VETERANS OF AMERICA

Mr. Bollinger. Thank you, Mr. Chairman, and thank you for inviting PVA to testify today.

We are particularly grateful that you've chosen to hold this hearing at a time when the era of judicial review has reached a level of development where we're beginning to see clearly how the appellate process is doing under the Veterans Judicial Review Act. As the law is interpreted and actually put into place, we have had the opportunity over the past year-and-a-half or so to observe the implementation of judicial review and to be active participants in the application of these newly interpreted rules and practices.

In our written testimony we have discussed our assessment of the overall appellate review processes that relate to judicial review in both BVA and COVA. This morning I would just like to highlight some of those observations.

First of all, as Mr. Bauer has pointed out, BVA has, indeed, made some significant improvements, primarily in the timeliness factor. Although the total processing time for an appeal, beginning at the regional office and ending with the final decision of the Board, remains much too long, the Board itself has dramatically reduced its own response time. Of course, the question that you've already asked this morning is what effect, if any, does that have on quality.

It is hard to measure quality when talking about the substantive decisions made by the Board. We have got to believe, however, that the Board's routine use of two-member panels to expedite claims is not, in the long run, in the best interest of claimants, nor do we believe it represents the intent of Congress. The statute clearly intends that, except in unusual circumstances, veterans claims at BVA should be decided by three members. As we understand it, there are now approximately one-third of BVA's panels composed of only two members.

We believe the Chairman has historically treated veterans fairly when exercising his authority to use two-member panels, but we're concerned about the trend of the routine use of panels merely to improve productivity statistics. In short, except in unusual circumstances as set forth in the law, we believe veterans should be entitled to the decision-making talents and thoroughness of three-member panels.

I would like to raise the next issue primarily as a note of caution as something we believe should be monitored as the new relationship between the Board and General Counsel develops in light of the Court of Veterans Appeals. General Counsel is in a very unique position now, in that on the one hand they represent the Secretary in cases before the Court, and on the other hand, by the use of precedent opinions, they directly influence the process by which BVA considers appeals.

For example, last May the General Counsel issued a precedent opinion holding that the passage of the Judicial Review Act extinguished the authority of BVA's Chairman to grant administrative allowances of claims. This ruling eliminated the long standing practice of permitting the Chairman to allow a claim in lieu of establishing an expanded panel to further consider an appeal.

This past August, General Counsel issued a precedent opinion which voided reconsideration procedures previously established by the Board. I believe the subcommittee should be aware that the control of the process of decision making of the BVA by the same attorney charged with defending the Secretary in actions brought to challenge the Board's decisions, at the very least, raises a potential conflict. We therefore encourage you to monitor this situation closely as the relationship matures between General Counsel and the Board to ensure that ultimately the best interests of veterans are being served.

Finally, regarding the Court, H.R. 5657 was recently introduced, I believe by request by Chairman Montgomery, and in enacted, it would, among other things, repeal the requirement that the Court include in its decisions conclusions of law and its determinations regarding factual matters. We strongly encourage you to reject this provision of the bill. At this early stage of life of the Judicial Review Act, it is critically important that BVA, the VSOs, and all others that are involved in the appellate process, clearly understand the Court's rationale and legal conclusions and factual findings. Last year this subcommittee passed legislation requiring the Veterans Benefits Administration to provide such thorough explanations when deciding a claim. We believe the Court should continue to do the same.

Thank you.

[The prepared statement of John Bollinger appears at p. 121.]

Mr. PENNY. Mr. Schultz.

STATEMENT OF RICHARD F. SCHULTZ, ASSOCIATE NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS, AND EDWARD J. KOWALCZYK, ASSOCIATE NATIONAL SERVICE DIRECTOR FOR CLAIMS

Mr. SCHULTZ. Thank you, Mr. Chairman. With your permission, Mr. Kowalczyk and I will summarize DAV's views on the appeals process at regional offices, the Board of Veterans Appeals, and the Court of Veterans Appeals.

Mr. Chairman, concerning timeliness of the appeals at the regional office, we would like to again point to a May, 1990 GAO report that illustrates problems. According to this report, the average processing time of appeals in VA's 58 regional offices ranges from 172 to 623 days. We note, however, that BVA, in a 9-month period, reduced the appeals processing time from 238 days to 148 days. This 90-day reduction is phenomenal, especially in view of the fact that BVA was given no FTEEs to accomplish this feat.

A number of factors have contributed to the rapid decline in the time it takes to process BVA appeals, and while we applaud efforts to give our Nation's veterans a more timely decision on their appeals, we must caution that the rights of appellants and the quality of appeals decisions must not suffer at the expense of timeliness.

I would also like to mention a problem regarding the traveling section of BVA. We have been informed that with the current schedule, some veterans will be required to wait several years to present their appeals before BVA's traveling section at regional offices. We would hope that more hearing dates will be made available at regional offices experiencing these high requests for BVA travel section hearings.

In regards to the Court of Veterans Appeals, Mr. Chairman, underlying DAV's support of legislation that established the Court was our firm commitment to retain the current, nonlawyer representation before VA and provide for nonlawyer representation before COVA. Our particular interest is based on the serious national problem of unmet legal needs. We believe that DAV's nationwide corps of nearly 300 professional lay advocates provides a leading edge example of one way to meet those needs. We also believe that COVA's unique authority to admit nonlawyers to practice before the Court gives the Court a special opportunity to advance that example.

In this regard, we have three suggestions to make. First we note that COVA has, by order of June 6, 1990 established an admissions committee composed of three lawyers. We would urge lay representation be added to that committee as soon as possible.

Second, H.R. 5130, introduced at the request of Chief Judge Nebeker, would, in part, authorize COVA to create a judicial conference and to provide for "active participation by persons active in the legal profession". We recommend addition of the phrase, " . . . and veterans affairs" after the word "profession" to make more explicit the Court's stated desire to consider the needs of nonattorney representatives for such participation.

Third, COVA Associate Judge Kramer now chairs the veterans benefits committee of the Section on Administrative Law and Regulatory Practice of the American Bar Association and will initially focus on assistance for pro se litigants who comprise more than half of the Court's current workload. We would encourage the committee, the section, and the ABA to make provision for meaningful involvement by nonlawyer representatives in the work of the committee. In these illustrative ways, we believe the bench and bar will each be better positioned to contribute to improving the Nation's system of justice for both veterans and their fellow citizens.

At this time Mr. Kowalczyk has a few remarks also about the Court of Veterans Appeals.

Mr. **Kowalczyk**. Thank you, Rick.

Mr. Chairman, it's a personal privilege for me to appear before you today and report on the activities that the DAV has been involved in at the United States Court of Veterans Appeals over this past year.

The Court of Veterans Appeals, we have found, is very receptive to the needs of this Nation's veterans, and I would like to compliment Chief Judge Nebeker for the courtesy he has shown to these veterans.

We have been having considerable difficulty with the General Counsel in our dealings at the Court, and, as the major practitioner before the Court, the DAV feels it's in a position to report these problems to you. One of the problems is that the Court is currently faced with a pro se calendar of approximately 59 percent of its total docket. The General Counsel requires that, in order for us to review a claims file to determine if we can offer representation to veterans, the claimant first file an appeal pro se. This is totally unnecessary and, of course, it inflates the Court's docket.

Another problem we recently ran into, Mr. Chairman, is the General Counsel taking cases that we brief before the Court and referring those cases to the Board of Veterans Appeals for reconsideration. They have done this without notifying the Court or the DAV of the action, and this, of course, is causing considerable difficulty.

I believe that concludes the comments that I have.

[The joint statement of Richard F. Schultz and Edward J. Kowalczyk appears at p. 128.]

Mr. **McEwen**. Ed, can you repeat that last sentence? They did what?

Mr. **Kowalczyk**. We have briefed cases, and they have sent those cases, without notifying the Court and without notifying us, to the Board of Veterans Appeals for the purpose of reconsideration.

We have filed an injunction with the Court on this matter, and I'm sure we will be hearing on it one way or another. I thought it was worth mentioning at this point because, if it is not resolved to the satisfaction of the DAV and, of course, the claimant, it may have to come before this committee for resolution.

Mr. **Penny**. Mr. Manhan.

STATEMENT OF ROBERT D. MANHAN, SPECIAL ASSISTANT, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Mr. **Manhan**. Thank you very much, Mr. Chairman. It is a pleasure to be here this morning.

After listening to the highlights of the statements from the representatives from PVA and DAV, I will try to briefly outline only those issues where the VFW's statement differs.

We looked at the total workload of the BVA over the last 23 months, which would include all of fiscal year 1988 through the first 11 months of fiscal year 1990, and we noticed a total of 37 percent of all of the cases that BVA handled were either approved or remanded to the regional offices. Based on that factor, plus all of the discussion regarding timeliness, it led us to provide our only conclusion to this oversight hearing. It is simply that we think the Secretary of the VA must give a very high priority to the issue of improviding timeliness of all claims within his organization.

We thought historically that the VA's Appeal Records Management System, the acronym VARMS, was to have addressed this problem several years ago. And over the past years, during hearings we always get pieces of how VARMS is being automated and updated. But there is still a significant problem of overall poor response time that the VFW believes is beyond the scope and responsibility of BVA itself to resolve.

Now, just briefly touching on how the VFW perceives COVA to be operating, we have had a bit of a problem obtaining the C-files of veterans who would like us to represent them before COVA. Mechanically, the General Counsel of VA requires us—and I'm sure all of the veterans service organizations—to accept the case before we have the opportunity to review the entire C-file to determine the merits of the issues. We think that that probably works against the entire system.

Thank you, Mr. Chairman. That summarizes our statement.

[The prepared statement of Robert Manhan appears at p. 136.]

Mr. PENNY. Mr. Wilkerson.

STATEMENT OF PHILIP R. WILKERSON, ASSISTANT DIRECTOR, NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION, THE AMERICAN LEGION

Mr. WILKERSON. Thank you, Mr. Chairman. The American Legion appreciates this opportunity to comment on the current operations of the Board of Appeals.

The requirements of Public Law 100-687 providing for judicial review as well as additional due process procedures, together with more recent legislation, have had, in our opinion, a significant effect on the ability of current staffing at the regional offices and the Board to handle the pending workload in a timely manner.

In contrast to the steady increase in processing times of benefit claims in the regional offices, which were the subject of a hearing conducted by this subcommittee earlier this year, the number of days to complete the overall processing of an appeal at the regional office level has not increased as drastically.

One of the major improvements in the adjudication and appeals process has been the hearing officer program. We believe it has been successful in providing veterans an impartial hearing at the regional office, with favorable resolution of many claims. Additionally, such hearings help ensure the inclusion of information and evidence the claimant deems important to eventual consideration by the Board and possibly COVA.

Over the last 3 years, the remand rate has risen from 18.8 percent to 23.6 percent. We believe this increasing rate reflects not only the Board's concern for the issue of due process and the need for further development of cases by the regional office, but also highlights the deterioration and the quality of basic adjudicative actions caused by inadequate staffing and training and the effects of an emphasis on productivity.

Over the last several years, The Legion has become increasingly concerned by the amount of time to complete an appeal. Even before the enactment of Public Law 100-687 and judicial review, elapsed processing time had begun to increase dramatically. This went from 106 days in fiscal year 1986 to a 192 days currently, with over 22,000 appeals pending.

We also feel the lack of a medical advisory staff may affect the quality of the Board's decisions. Staffing for medical advisers has gone from six FTEE in fiscal year 1986 to one at present, and he is only part time. Many of the cases coming before the Board involve complex medical issues and, with such minimum staffing support, we believe the Board may not have the necessary medical advise readily available to assist in deciding such complex cases. Moreover, there appears to be a significant decline in referrals to independent medical experts and the Armed Forces Institute of Pathology over the last several years. We feel very strongly that veterans should be confident that the Board will undertake any necessary action by way of development, including obtaining such advisory opinions to assure the fullest possible consideration of their appeal.

Despite the foregoing problems, the Board reports in recent months it has been able to make significant improvements in productivity, and we believe they are to be commended for their efforts. The American Legion, however, is at the same time concerned that this increased productivity may have come at the expense of quality in the decision-making process. We have found that some sections of the decisional document are often abbreviated and it's difficult to determine the basis for the Board's decision. In addition, because of the shortage of Board members, some decisions are signed by only two-member panels. We do not believe these practices are in the best interest of the appellant.

In conclusion, we feel there is an urgent need for additional staffing support at both the regional office and at the Board to ensure that appellants receive full due process and a full and fair consideration of their appeals in a timely manner.

Thank concludes our statement, Mr. Chairman.

[The prepared statement of Philip R. Wilkerson appears at p. 143.]

Mr. PENNY. Thank you.

I'm going to start with you, Mr. Wilkerson. How do you reconcile your enthusiasm for a single signature decision by a hearing officer at the regional level and your unhappiness with the two-member decision at the Board of Appeals?

Mr. WILKERSON. I believe that raises an issue which I am just not prepared at this time to respond to directly, but I would be glad to give it some consideration and provide a written response.

Mr. PENNY. Well, it would be helpful to us. If the value of three members participating in the review supposedly adds to the quality of the decision, the thoroughness of the process, that procedure at the regional level in which you can get a hearing officer involved to take another look at a case seems to move us in the other direction. It indicates that we're allowing an individual judgment to overrule a judgment that's been made by a larger panel. I'm not saying the hearing process isn't appropriate, but it does seem to be a contradiction.

All in all, we have seen these delays at the regional office. We assume some of it has to do with staffing, et cetera. It might have to do with increased claims being filed. But if we're going to process these claims, the related issue is how to prioritize those claims, if some claims are going to wait longer than others. Are there some that ought to be treated on a priority basis, or should we just take them first come/first served, regardless of what type of claim it is, and work down the stack? How would each of your organizations propose that we prioritize claims, keeping in mind some are for death benefits and some are for initial compensation, and others are for appeals on levels of compensation, et cetera. Do you have some suggestions for us?

Mr. SCHULTZ. Mr. Chairman, currently I know at regional offices we have been successful in having certain cases heard earlier where an individual has a terminal illness or where there's a problem for one reason or another, that a claim need to be expedited.

I think one of the problems also, as pointed out by Mr. McEwen, is the fact that there is really no standards set right now for handling claims or appeals. I think they need to take a good look at this issue. I believe maybe there should be some good healthy debate over that very issue that you raise today. Together with the Congress and service organizations and the VA, maybe we can come up with a better system to expedite these claims and to put some priorities on them. Hopefully, the overall system will benefit from that.

Mr. PENNY. Anyone else?

Mr. BOLLINGER. Mr. Chairman, I, too, would have to agree. I think guidelines should be set and some standards should be set in terms of what types of claims should take priority. We haven't thought about this too deeply, but certainly compensation and pension claims would take priority over education claims and, I would say right now, death claims. I think there would be certain instances where certainly, in the event of a terminal illness or some situation that would demand quick action, I think that could be worked out easily through the regional office. But certainly guidelines have got to be set.

Mr. MANHAN. Mr. Chairman, the VFW would like to respond as one of the major service organizations. Trying to balance the philosophic question of equity and propriety, we would prefer the first come/first served way of doing business. We don't want to introduce another level of valuation or judgment as to which claim is more sensitive because every case to every veteran is important. That's the way we would like to handle it. We know at the BVA level they do specialize. PTSD cases, for example, go to a certain team, ionization cases to another. So when they come back to us again, they are date stamped and we'll process them along that way.

Thank you.

Mr. WILKERSON. I would like to comment, Mr. Chairman, that I don't believe it would be appropriate to prioritize all cases, recognizing that there are truly certain needy situations require special handling. I think certainly those provisions are appropriate to the overall claims process. Each individual controls when he submits his own claim and is certainly entitled to the benefit once it has proceeded through the administrative process.

Mr. **Penny**. Thank you.

I have one last question of Mr. Kowalczyk. I'm not an attorney, which places me in the minority here in Congress, so I am not familiar with the court process. But you mentioned your concern that the General Counsel at the Court of Appeals, on his own initiative, can refer certain cases back to the Board.

In a district court system, or a county court system somewhere in the country, would the normal procedure be that if an appeal were made from that level to an appellate court, that if it's going to be referred back to the district court or the county court for a reconsideration, that it would either have to be done by the judge at the appellate court or through kind of a joint decision of the prosecuting and defense attorneys? They can then request the Court to refer it back?

It does sound like an unusual process to me, in which one party to the dispute would be able to make that judgment without the concurrence of the other participant.

Mr. **Kowalczyk**. First of all, let me state that we share a common bond; I'm not an attorney, either. I think you pretty well have paraphrased what is happening. If I might, I will take you through the process up until that point.

The veteran, at the time he receives his initial Board of Veterans Appeals decision, has a number of options available to him. He can request reconsideration at the Board of Veterans Appeals at that juncture, or, with the enactment of the Judicial Review Act, he can now take the case to the United States Court of Veterans Appeals.

In the cases that I'm talking about, the veteran has made that choice and he has filed his appeal with the United States Court of Veterans Appeals and has gone through the process, which is a lengthy process, to the point of briefing.

The General Counsel for the Secretary, Department of Veterans Affairs, has recently referred at least six of our cases—and these are DAV cases—that have been briefed to the Board of Veterans Appeals for the purpose of reconsideration without notifying the Court or the representative of the DAV. The problem, of course, is we don't think the Board of Veterans Appeals can divest the Court of its own jurisdiction. The appeal is properly filed with the Court of Veterans Appeals. The Chairman of the Board of Veterans Appeals, upon accepting the reconsideration, vacates the prior decision. That's the decision the veteran was appealing to the Court.

This creates a realm of problems. The Board of Veterans Appeals tells the veteran that, after it reaches its decision on reconsideration, the veteran then has 120 days from the date of that decision to appeal to the Court. If the only final decision to be appealed to the United States Court of Veterans Appeals is the decision on reconsideration, one of the problems is, what do we do with the 1,100 or so cases that are pending at the Court right now based upon an original Board of Veterans Appeals decision.

In one of the cases that was sent over without our knowledge to the Board of Veterans Appeals for reconsideration, for example, the DAV did not hold the power of attorney with the Department of Veterans Affairs. That case was sent back to the organization of record for the reconsideration process. So the General Counsel not only snatched that case from the Court, but they snatched it from the DAV.

You might well imagine that this can cause a considerable amount of difficulty for the private practitioner, the attorney who takes on a case out in some remote area and brings that case to the Court of Veterans Appeals. When he briefs the case and the General Counsel snatches the case from the Court, from the attorney, and sends it to the Board of Veterans Appeals, perhaps the DAV was the representative, we present the case on reconsideration, the appeal is allowed, the attorney goes back to his client for his payment, and the client says the DAV won the case, you didn't.

I think this is an unheard of practice. It violates not only the trust that the veteran has placed in us to take his case through the channels that he chose, which was the Court of Veterans Appeals, but it can cause a lot of problems and unnecessary delay in claims because of the actual procedural steps of that process.

I hope that wasn't too lengthy a response to your question.

Mr. PENNY. Mr. McEwen.

Mr. MCEWEN. Thank you, Mr. Chairman.

I kind of fall down in the middle on this. I want the veterans to get what's coming to them as rapidly as possible. I'm not as enamored with the process as maybe others are.

You mentioned that you have an injunction against the General Counsel in doing that, right?

Mr. KOWALCZYK. Yes, sir.

Mr. MCEWEN. And that's pending before the Court of Veterans Appeals?

Mr. KOWALCZYK. The United States Court of Veterans Appeals.

Mr. MCEWEN. So they're going to rule on this, right?

Mr. KOWALCZYK. I would hope so, yes, sir.

Mr. MCEWEN. So then this will all be put to bed.

Mr. KOWALCZYK. If I might make one comment—and I share your concern, this is an expedient process by which the veteran receives every benefit. By the time the veteran gets to the Board of Veterans Appeals and gets a final decision, we've already exhausted perhaps a year, maybe 2 years. When the case gets to the United States Court of Veterans Appeals, to the briefing stage, you're talking possibly another six to 8 months. If the case is taken to the Board of Veterans Appeals for reconsideration, there are natural processes that fall in place. For example, 60 days for the representative at the Board of Veterans Appeals to file his statement, and then whatever time it takes for the Board to reach its decision. So you're possibly tacking on an additional year just for that process. And if that decision remains adverse to the veteran, then you go back to the Court of Veterans Appeals. So maybe we're looking at four to 5 years for a decision.

Mr. MCEWEN. It is my understanding that after the briefing at the Court and it becomes apparent to the General Counsel that they've got a loser and the veteran was right, rather than spinning the wheels further they just say we concede this and it's no longer a judicial question before the Court; is that right or wrong? Am I misunderstanding?

Mr. Kowalczyk. I'm not going to say that couldn't be a possibility, but when the General Counsel reaches a point where it knows it has a loser, for example, and it should allow the benefit, the General Counsel should enter into a settlement.

In one of my cases, the General Counsel offered up a settlement in May, and then in September decided that, rather than go through the settlement process, they would send the case over for reconsideration to the Board of Veterans Appeals. The Board of Veterans Appeals is not bound by any settlement agreement reached by the General Counsel.

Mr. McEwen. So they can throw it out again?

Mr. Kowalczyk. They could send the case back to the regional office to develop the case to buttress their prior denial; they can order IME's on medical questions. There is no assurance that——

Mr. McEwen. I see.

Mr. Kowalczyk. —the reconsideration is going to be for the purposes of settlement.

Mr. McEwen. I see. That's very helpful. In other words, you just get locked back in the system again, so it's not really an out-of-court settlement. It's just a throwback to the circle.

Mr. Kowalczyk. Yes, sir.

Mr. Bilirakis. Would the gentleman yield just on a follow up there?

In practice, though, what actually happens? What's the history of these types of situations, where an agreement has been reached and then goes back to BVA?

Mr. Kowalczyk. As of this point, I can only restate what I said just a moment ago. In one of our cases we had been offered a settlement, and the General Counsel decided that they did not have the authority to settle, or whatever their reason was. They sent that case to the Board of Veterans Appeals on reconsideration without our acquiescence or notifying the Court. So we don't have a track record for what's going to happen.

Mr. Bilirakis. So your response to Congressman McEwen is what probably will happen but it's not on the basis of what actually has happened?

Mr. Kowalczyk. Yes.

Mr. McEwen. That's an excellent point.

Mr. Thompson, is this basically a concession on the part of the Veterans' Administration or not?

Mr. Thompson. Mr. McEwen, I would prefer Mr. Tapp to answer that.

Mr. Tapp. What generally happens, when we get a case in the office and the attorney reviews the case, he or she looks at a case and feels there was some error committed at the Board, something wasn't done—maybe there needs to be another medical examination—or there may be some defect in the proceedings at the Board, instead of going through the process of briefing the case and litigating the case before the Court of Veterans Appeals, and having the Court remand the case back to the Board to go through the same procedure again, we ask the Board of Veterans Appeals to take another look at the case, to reconsider the case and to address the specific issues that we have identified to see if they committed some error.

We think that is the judicial and fair thing to do in respect to veterans, instead of going through the drawn-out process of briefing the cases, either having oral argument, litigating the case, and having the case simply——

Mr. **McEwen**. The veteran's point is that—Suppose this factor has been overlooked, has been overlooked now through four steps. He is now going to the Court. You say, "Sure enough, they didn't take this into consideration."

Then isn't it fair at that point to settle the case?

Mr. **Tapp**. Well, the settlement question is a question we wrestled with earlier on. The issue was whether or not the General Counsel, in fact, statutorily had the authority to settle cases.

Mr. **McEwen**. It isn't necessarily General Counsel settling. It's just a matter of the VA saying we no longer contest the case and therefore process it, right? It's a distinction without a difference.

Then why don't you just go before the Court and say yes, we concede? Is it because you want to go back through and let everybody go through an examination four more times?

Mr. **Tapp**. Well, it's because in some instances we don't know exactly what—specifically in rating cases—we don't know exactly what the rating should be. We can't settle based on that, if the rating should be 40 percent, 50 percent or 60 percent. If we knew that, then we're getting into the adjudicatory phase of the case, which the Board or the regional offices do. Those things we don't know.

In regard to what Mr. Kowalczyk said earlier, just so the committee is clear, the Government or the VA is not taking the case away from the Court. We ask the Court to take another look. The issue is, as the Congressman aptly pointed out, an issue that is being litigated before the Court right now. It will be resolved as to whether or not we have the authority to ask the Board to reconsider cases.

Mr. **McEwen**. What happens with the Court? Do you ask them to stay the decision, or do you ask them to dismiss it?

Mr. **Tapp**. What we have done is ask the Court to dismiss the decision. If the Board decides to reconsider the case when we send it back, we just ask them to take another look. If they decide to order reconsideration, we ask the Court to then dismiss the case because it's our contention that the Court no longer has jurisdiction. When they reconsider the cases, they'll be vacated. But that's a matter, as I said, that will be decided by a panel of judges before the Court of Veterans Appeals. The issue is still ripe for adjudication.

Mr. **McEwen**. It certainly would be handy if we could talk to the Court of Appeals and ask them how they're doing this. It's an idea that the Chairman had. If the clerk is here taking notes, you can take notes back that we would like to have you either settle that decision or else we'll settle it ourselves if you won't talk to us. Thank you very much.

Rick, do you have any comments on my bill?

Mr. **Schultz**. Mr. McEwen, we certainly applaud your efforts to speed the process up. I think this is a good effort and I believe we should have some good debate about it.

Mr. **McEwen**. Thank you, sir.

Mr. Penny. Before I call on Mr. Bilirakis, is the Clerk of the Court here? Okay. I'm trying to figure out who you were. We're glad your here. We won't put you on the spot by calling your forward, but we do appreciate your participation as a member of the audience. I hope that some of what's being discussed here will assist you and the Court in alleviating some of these concerns.

Mr. Bilirakis.

Mr. Bilirakis. Thank you, Mr. Chairman.

I still didn't get clear in my mind in the cases where the Court has decided to settle this thing and reached an agreement, but then the BVA can just overturn it or completely ignore it. Maybe that's something we ought to specifically write a letter on and request a written response.

The Legion, Phil, does not routinely represent claimants in cases before the Court; the DAV has provided representation for almost 300 claimants. So basically what we're saying is your roles—Ed went through that very good explanation of the process—but your organizations' roles in that process differ, obviously; is that right?

Mr. Wilkerson. Yes, sir.

Mr. Bilirakis. Ed, you referred to a major problem being that the Court is faced with pro se appellants, those representing themselves before the Court. They aren't familiar with court proceedings, as you said, which, of course, would be true, and are not familiar with its jurisdiction and the scope of the Court's review.

Now, are these appellants who all the way through the process have basically represented themselves and have not gone before the DAV or started with the DAV service officer, et cetera?

Mr. Kowalczyk. No, sir, I wouldn't say that to be the fact. I don't have statistics, but I believe a good percentage of veterans are represented by one of the veterans' organizations throughout the appeals process.

Mr. Bilirakis. But there is apparently an adequate enough percentage of those who represent themselves because you have raised that as a major problem.

Mr. Kowalczyk. At the Court, yes, sir. They have filed their own appeals with the Court. It seems to be somewhere around 59–60 percent of the total docket, which I believe is 1,100 or 1,200 right now.

Mr. Bilirakis. Are any of those people those who had as a partner through the process the DAV up to the particular point of going to the Court, and then decided to go on alone after that?

Mr. Kowalczyk. Yes, sir.

Mr. Bilirakis. Why would that be the case?

Mr. Kowalczyk. I really don't know.

Mr. Bilirakis. Are they sort of unhappy with your work for them up to that point and try to go it alone?

Mr. Kowalczyk. I can tell you this. Perhaps I don't know the reason why these people chose to go that route, but I can tell you that when it comes close to the time to brief, they come back and want us to get in and brief the case for them.

I think it could be the fact that they are not familiar with the system and don't realize or perhaps pay any attention to the fact that it is an Article 1 Federal court and they feel they can get their day in court by themselves. I don't know.

Mr. Bilirakis. We see statistics and I know this varies, but I always have to say, and I don't like to say it, that about 85 percent of veterans out there—maybe it's more, maybe it's something less—do not belong to any of the veterans' organizations. Is that about right?

Mr. Kowalczyk. I think the number might be higher, sir.

Mr. Bilirakis. It might be higher?

Mr. Kowalczyk. Yes, sir.

Mr. Bilirakis. Hopefully so. But the point that I guess I'm getting at is that those who belong to veterans' organizations know, hopefully, about the service officer and they start their case basically at that point. I know we've had testimony here in the past about some of the problems and some of the delays as a result of incomplete information or filling out the documentation at that initial stage incorrectly and then having to be bounced back. Hopefully that's being taken care of. I know that your service officers are great people and work awfully hard.

I guess I'm getting to that situation of the 80 or 85 percent, whatever it is, who don't belong to any of the service organizations. How do they start a case? Assuming now that the 15 percent who belong to organizations start with the service officer, how do their cases in the actual real world start?

Mr. Kowalczyk. If I might, I would like to offer a comment to that.

First of all, the DAV just doesn't do service work for its members only.

Mr. Bilirakis. I didn't insinuate that.

Mr. Kowalczyk. That would take in a good number of those veterans who are not members of the organizations that you just referred to.

Second of all, there are a number of vehicles available. It's ironic I should say "vehicle" because the thought popped in my mind that we have a field service unit program, where we send vans around the country throughout the year looking for veterans to try to help them. But these veterans can initiate their own claims with the help of the Veterans' Administration itself at the regional office, and at VA hospitals where they have contact officers to help Veterans with that initial process, if that answers your question specifically.

Mr. Bilirakis. So that's basically where they would start. Somewhere along the line they make a decision to continue on on their own or hire an attorney or go to one of the posts or whatever. I know that the DAV and all of the posts with your service officers don't turn back people who don't belong to the VFW, for instance.

Bob, if a nonmember comes to a VFW service officer, he or she tries to help them. That's certainly my understanding.

Mr. Manhan. That is true of the VFW, Mr. Bilirakis. Yes, we will accept any veterans request for assistance unless we have good reason to believe it to be a false claim.

Mr. Bilirakis. Are you saying it's not true with the other service organizations?

Mr. Manhan. I can't speak for them.

Mr. Bollinger. Mr. Bilirakis, the Paralyzed Veterans of America has been very active in representing veterans in front of the Court.

We have, by national resolution, set a list of priorities. We will represent our members first, other nonmember veterans who have been represented by PVA through the administrative process, including the Board of Veterans Appeals, and other veterans requesting such representation, provided they were not previously represented through the Board of Veterans Appeals by another organization. We will also represent cases where the issue will affect our membership, especially as it pertains to spinal cord injury dysfunction issues.

Mr. BILIRAKIS. In making that decision to represent that member who is not a member of PVA, do you take into consideration whether that person would qualify to be a member of PVA, or just if he's a veteran?

Mr. BOLLINGER. No. We took the position——

Mr. BILIRAKIS. For instance, the VFW has certain standards of serving overseas or in wartime, et cetera. Must that person be somebody who would ordinarily qualify to be a member of the VFW before you would consider handling his case?

Mr. MANHAN. No, sir. Membership in the VFW does have a criteria, as you have outlined. But if a veteran were to come into the regional office here in Washington, D.C., all we ask is to see his discharge to ensure that he was discharged under honorable conditions. We don't care if he did all of his time in the Continental United States and, therefore, not eligible for membership in our organization. We will then proceed with his case without any further distinction.

Mr. BILIRAKIS. Thank you.

I don't want to take up any more time, Mr. Chairman. I know my time is up. I realize this is somewhat separated from maybe the gist of the hearing here today. But it all starts at that point, and if we can get it started right at that point, maybe it will expedite the process all the way through.

Thank you, gentlemen.

Mr. PENNY. Thank you.

I just have one last question for the panelists. What role, if any, did your organization play in working with the White House to secure a nomination for Chairman of the BVA? If you did have a role, what is your understanding as to why it took so long?

Mr. SCHULTZ. Mr. Penny, I know that we had worked with the White House, just to the degree that we let them know that we would like to have a nominee as expeditiously as possible. Obviously, the fruits of our efforts were long in coming. But to that extent, that's about all can tell you.

Mr. PENNY. Did any other organization have a more direct involvement?

Mr. BOLLINGER. Mr. Chairman, I, too, can't account for what took them so long. At one point we did write a letter that did support an individual several months ago.

Mr. PENNY. Not the one named?

Mr. BOLLINGER. That's correct.

Mr. PENNY. Did anyone else make recommendations or have any feedback from the White House as to the process here?

Mr. WILKERSON. No, sir.

Mr. **Manhan**. To the best of my knowledge, Mr. Chairman, the VFW, like PVA, did write a letter several months ago recommending the name of one individual. We too, did not receive any feedback from the White House.

Mr. **Penny**. Well, the unfortunate circumstance is that we're likely to see that slip until next year, although when I look at our legislative schedule over the next 2 weeks, and all of the bills that the Speaker thinks we ought to process on the House floor while awaiting the conclusion to the budget, I don't know why the Senate couldn't take care of a few extraneous matters as well, including confirmation in this area. Nonetheless, it looks like it's going to slip until next year and that doesn't help any of us.

I appreciate again all of your participation this morning. I do want to indicate that the VVA had submitted a written statement and, without objection, that will be included in the official hearing record.

[The statement of the Vietnam Veterans of America appears at p. 149.]

Mr. **Penny**. There being no further questions from members of the committee, the meeting will stand adjourned.

[Whereupon, at 11:05 a.m., the subcommittee was adjourned.]

APPENDIX

OPENING STATEMENT
HONORABLE DOUG APPLEGATE, CHAIRMAN
SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE

OVERSIGHT HEARING ON THE OPERATION OF THE BOARD OF VETERANS APPEALS AND THE U.S. COURT OF VETERANS APPEALS
OCTOBER 4, 1990

GOOD MORNING LADIES AND GENTLEMEN, THE SUBCOMMITTEE WILL COME TO ORDER. WE ARE MEETING THIS MORNING TO HEAR TESTIMONY FROM THE DEPARTMENT OF VETERANS AFFAIRS AND VETERANS SERVICE ORGANIZATIONS ON THE OPERATION OF THE DEPARTMENT'S BOARD OF VETERANS' APPEALS AND THE UNITED STATES COURT OF VETERANS APPEALS.

Regrettably, we will not be hearing from the Chief Judge of the Court today, but I have received documents from Judge Nebeker which address some aspects of the court's operation. I will include a copy of a letter from Judge Nebeker dated September 12, 1990, with its enclosures, as well as my reply to the Judge on October 1, 1990, as part of the record for today's hearing. I have advised the Chief Judge that we may well direct written inquires to him as a follow up to today's hearing.

Since our last oversight hearing on the BVA, on June 14, 1989, the Board has taken

AGGRESSIVE ACTION TO REDUCE ITS RESPONSE TIME ON APPEALS, FROM A HIGH POINT IN DECEMBER 1989 OF OVER 230 DAYS, TO APPROXIMATELY 145 DAYS AS OF THIS PAST AUGUST. THIS IS A TRULY REMARKABLE TURNAROUND AND THE CHAIRMAN AND VICE-CHAIRMAN SHOULD BE COMMENDED, ESPECIALLY IN LIGHT OF THE FACT THAT THERE HAS BEEN A CONSIDERABLE TURNOVER IN THE LEGAL STAFF AND UNFILLED VACANCIES AMONG BOARD MEMBERS. THE OBVIOUS QUESTION THAT COMES TO MIND IN LIGHT OF THIS DRAMATIC IMPROVEMENT IN TIMELINESS IS WHETHER THE QUALITY OF DECISIONS HAS SUFFERED. HOPEFULLY, OUR WITNESSES TODAY WILL BE able to address this concern. In regard to vacancies on the Board I want to note that it has been nearly two years since the Congress mandated that a Chairman be newly nominated and confirmed by the Senate. Only in recent days has a nomination been submitted to the Senate for confirmation. This has prevented the nomination of any other Board members to fill vacancies and ignores the statutory requirement that all of the Board members be nominated and confirmed by the Senate. The President has nominated Mr. Charles Cragin to be the new Chairman of the Board, but it is extremely doubtful that

THE SENATE WILL BE ABLE TO ACT ON HIS NOMINATION THIS SESSION. WHY HAS IT TAKEN THE ADMINISTRATION NEARLY TWO YEARS TO COMPLY WITH THE LAW? I DON'T EXPECT ANY OF YOU HERE TODAY TO BE ABLE TO ANSWER THAT QUESTION, BUT IT IS ONE THAT IS VERY TROUBLING TO THE SUBCOMMITTEE.

I LOOK FORWARD TO HEARING FROM EACH OF OUR WITNESSES AND I THANK EACH OF YOU FOR YOUR PARTICIPATION IN THE HEARING.

DEMOCRATS
G.V. (SONNY) MONTGOMERY, MISSISSIPPI
DON EDWARDS, CALIFORNIA
DOUGLAS APPLEGATE, OHIO
LANE EVANS, ILLINOIS
TIMOTHY J. PENNY, MINNESOTA
HARLEY O. STAGGERS, JR., WEST VIRGINIA
J. ROY ROWLAND, GEORGIA
CHARLES W. STENHOLM, TEXAS
CLAUDE HARRIS, ALABAMA
JOSEPH P. KENNEDY II, MASSACHUSETTS
ELIZABETH J. PATTERSON, SOUTH CAROLINA
JIM JONTZ, INDIANA
L.F. PAYNE, VIRGINIA
BRUCE A. MORRISON, CONNECTICUT
GEORGE E. SANGMEISTER, ILLINOIS
MIKE PARKER, MISSISSIPPI
BEN JONES, GEORGIA
JILL L. LONG, INDIANA
PETE GEREN, TEXAS
GEORGE J. HOCHBRUECKNER, NEW YORK

MACK FLEMING
STAFF DIRECTOR AND CHIEF COUNSEL

ONE HUNDRED FIRST CONGRESS

G.V. (SONNY) MONTGOMERY
CHAIRMAN

U.S. House of Representatives
COMMITTEE ON VETERANS' AFFAIRS
335 CANNON HOUSE OFFICE BUILDING
Washington, DC 20515

REPUBLICANS
BOB STUMP, ARIZONA
JOHN PAUL HAMMERSCHMIDT, ARKANSAS
CHALMERS P. WYLIE, OHIO
BOB McEWEN, OHIO
CHRISTOPHER H. SMITH, NEW JERSEY
DAN BURTON, INDIANA
MICHAEL BILIRAKIS, FLORIDA
THOMAS J. RIDGE, PENNSYLVANIA
JOHN G. ROWLAND, CONNECTICUT
ROBERT C. SMITH, NEW HAMPSHIRE
CRAIG JAMES, FLORIDA
CLIFF STEARNS, FLORIDA
BILL PAXON, NEW YORK

October 1, 1990

Honorable Frank Q. Nebeker
Chief Judge
U.S. Court of Veterans Appeals
1625 K Street, Suite 400
Washington, D. C. 20006

Dear Judge Nebeker:

Thank you for your letter of September 12. I regret that you will not be appearing at our Subcommittee hearing on October 4.

While your letter does provide the Subcommittee with useful information, there are numerous other aspects of the Court's operation that you could have personally addressed without hesitation or reservation. I have no doubt that Subcommittee members may want to ask you for some additional information about the Court. If such questions are presented in the form of written questions, I would appreciate your prompt action in response.

I appreciate your offer to meet with me and other Subcommittee members on an informal basis to discuss items of interest regarding the Court. Perhaps we will have that opportunity in the near future.

With every good wish, I am

Sincerely,

DOUGLAS APPLEGATE
Chairman
Subcommittee on Compensation,
Pension and Insurance

DA:jr

United States
Court of Veterans Appeals

September 12, 1990

Chambers of
Chief Judge Frank Q. Nebeker

The Honorable Douglas Applegate
Chairman, Subcommittee on Compensation
Pension and Insurance
House of Representatives
Committee on Veterans' Affairs
335 Cannon House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I welcome the opportunity to inform the Subcommittee about the questions contained in your letter of September 7, 1990. You expressed Subcommittee interest in the status of the Court's rules of practice, the number of appeals, the general nature of cases argued or decided by the Court to date, and the budget needs of the next fiscal year (1991). I believe that response to these inquiries by way of this letter in lieu of written or oral testimony, will be more than adequate as the response to each is brief and already of public record.

The Court's Rules Advisory Committee is about to submit its report and recommendation respecting proposed permanent General Rules of the Court. When the Court receives that material, it will consider it in adopting the General Rules. As soon as its Rules are adopted, I will supply the Committee on Veterans' Affairs with copies.

The number of appeals (plus All Writs petitions) filed from October 16, 1989, to August 31, 1990, is 1,088.

As to the nature of the cases decided by the Court, I believe it would be more appropriate for the opinions to speak for themselves than for me to characterize or analyze them. Beginning with our first decision, the Court has provided the Committee on Veterans' Affairs with copies of each opinion. I enclose copies for your use.

Attached to and incorporated herein is the Court's operating budget request for FY 1991. The House took favorable action on this request in HR 5153 on June 28, 1990. I also attach a copy of my letter of August 30, 1990, to Chairman Montgomery with an attached copy of the Court's report to OMB respecting the impact of a sequestration of funding under the so-called Gramm-Rudman-Hollings Act, and my letter of June 29, 1990, to the Honorable

Edward J. Derwinski, Secretary of Veterans Affairs, respecting release of funds not needed during FY 1990. Just yesterday I received a copy of a letter of September 7, 1990, from Senator Cranston to Senator Sasser on the potential budget plight of the Court. I take the liberty of enclosing it for your information. These documents present a rather full picture of the Court's budget needs for next fiscal year.

I remain willing and available to respond appropriately to Committee inquiries. In the past year, it has been found quite satisfactory to supply an overview of Court operations at the yearly hearings of both Veterans' Affairs Committees on budget needs of the Court. I would welcome an opportunity to visit informally with you and other subcommittee members at your and their convenience.

Sincerely,

Frank Q. Nebeker

Frank Q. Nebeker
Chief Judge

Enclosures

cc: Honorable Alan Cranston
Honorable G. V. (Sonny) Montgomery

FQN:acg

July 2, 1990

UNITED STATES COURT OF VETERANS APPEALS

OPINIONS LIST

APPELLANT'S NAME	COVA #	DATE ISSUED
Quigley, Michael	89-61	01-22-90
Skinner, Gordon B.	89-150	01-29-90
Erspamer, Jean A.	89-14	02-23-90
Torres, Rigoberto M.	89-126	03-09-90
Mokal, Albert A.	89-23	03-09-90
Doub, Larry Kendall	89-54	05-23-90
Rogozinski, Bernard J.	89-11	05-29-90
In Re: A Motion for A Standing Order	90-85	07-02-90
Swan, Charles E.	89-75	08-10-90
Frankel, Cleda V.	89-167	08-17-90

Note: Pursuant to 38 U.S.C.A. § 4067(d)(2) (West Supp. 1989), this decision will become the decision of the Court thirty days from the date hereof.

U.S. COURT OF VETERANS APPEALS
FILED
JAN 22 1990
Clerk

UNITED STATES COURT OF VETERANS APPEALS

No. 89-61

IN THE MATTER OF A LETTER FROM:

MICHAEL QUIGLEY,

PETITIONER.

Petitioner's Request for Emergency Hearing

(Submitted December 4, 1989 Decided December 19, 1989)

Dr. Michael Quigley, petitioner.

No appearance was entered on behalf of the Secretary of Veterans Affairs.

Before NEBEKER, Chief Judge, and KRAMER, and FARLEY, Associate Judges.

NEBEKER, Chief Judge: Michael Quigley, a veteran receiving benefits from the Department of Veterans Affairs, asserted in a letter to the Court that his fee-basis card -- a document entitling him to specific medical benefits -- was about to be revoked. Quigley attached to his letter a copy of a letter from the Chief of the Medical Administration Service which advised that the fee-basis card was to be revoked and that Quigley had a right to appeal the revocation decision within the medical center to the Director. Quigley sought from this Court an emergency hearing and an injunction preventing the revocation and preserving his fee-basis card rights. Quigley misaddressed the letter and it was not received by the Court until after the revocation occurred.

Although Quigley's letter does not contain a jurisdictional statement, the Court liberally construed the pro se allegations and prayer for relief as effectively asserting that this Court has jurisdiction of this matter either under the All Writs Act, 28 U.S.C. § 1651 (1982), or as an appeal under 38 U.S.C.A. §§ 4052, 4066 (West Supp. 1989). However, regardless of the jurisdictional predicate, the prayer for relief was premature.

The Court, having been "established by Act of Congress," has jurisdiction to act "in aid of [its] . . . jurisdiction[ ]" pursuant to the All Writs Act, 28 U.S.C. § 1651 (1982). "The exercise of this power . . . extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." Federal Trade Comm'n v. Dean Foods Co., 384 U.S. 597, 603 (1966). However, the Court need not reach the question whether the All Writs Act remedy should be granted in this case because it is apparent from Quigley's submission that he had failed to exhaust the administrative remedies available to him, including seeking review by the Board of Veterans' Appeals (BVA). Of course, the Court would have appellate jurisdiction to review a BVA decision declining jurisdiction, but that likewise was not before us.

Accordingly, the following order was entered on December 19, 1989:

UNITED STATES COURT OF VETERANS APPEALS

No. 89-61

U.S. COURT OF VETERANS APPEALS
FILED
DEC 19 1989
Clerk

IN THE MATTER OF A LETTER FROM:

MICHAEL QUIGLEY, Appellant.

ORDER

Before Nebeker, Chief Judge, and Kramer and Farley, Associate Judges.

On December 4, 1989, the Court received a letter dated November 15, 1989, wherein petitioner asks the Court for an emergency hearing and to enjoin the DVA from revoking petitioner's fee-basis card and it appearing from a letter petitioner enclosed from the Dallas, Texas Medical Center Chief, Fred W. Bell, Jr., dated November 15, 1989, that the card was revoked effective December 1, 1989, and that petitioner could appeal said revocation to the Medical Center Director, it is

ORDERED (1) that if petitioner's letter is treated as a request for extraordinary relief under 28 U.S.C. § 1651, petitioner has failed to exhaust his administrative remedies, and thus such relief would be inappropriate; and

(2) to the extent petitioner may be deemed to seek invocation of the Court's appellate jurisdiction, said appeal is dismissed for want of an appealable order. See 38 U.S.C. §§ 4052 and 4066 (1989); and

(3) petitioner's request for an emergency hearing and an injunction is denied.

PER CURIAM.

Copies to:

Dr. Michael Quigley
Route 2, Box 2245
Athens, Texas 75751

Honorable Edward J. Derwinski
Secretary of Veterans Affairs
c/o General Counsel (027)
810 Vermont Avenue, N.W.
Washington, D.C. 20420

United States
Court of Veterans Appeals

Melanie G. Dorsey
Executive Officer
Clerk of the Court

1625 K Street, N.W. -- Suite 400
Washington, D.C. 20006

January 30, 1990

MEMORANDUM

FROM: Melanie G. Dorsey, Executive Officer and
Clerk of the Court

RE: No. 89-150 - Gordon B. Skinner v. Edward J. Derwinski,
Secretary of Veterans Affairs

Attached is a per curiam order of the Court that consists of an amendment of this Court's opinion in the above referenced case released on January 29, 1990. Please be advised that a concurring opinion by Associate Judge Kenneth Kramer will be forthcoming.

UNITED STATES COURT OF VETERANS APPEALS

U.S. COURT OF VETERANS APPEALS
FILED
JAN 30 1990
Clerk

No. 89-150

GORDON B. SKINNER, Appellant,

v.

File No. 18 850 350/00

EDWARD J. DERWINSKI,
Secretary of Veterans Affairs,
Appellee.

Before: Nebeker, Chief Judge, and Kramer and Farley, Associate Judges.

ORDER

It is ORDERED, sua sponte, that this Court's opinion entered on January 29, 1990, is hereby amended to reflect the addition of the word "appellate" on page two, para. 1, line 1, after the word "its" of that paragraph.

PER CURIAM.

Copies to:

Mr. Gordon B. Skinner
1060 21st Avenue, S.E.
Minneapolis, MN 55414

Honorable Edward J. Derwinski
Secretary of Veterans Affairs
c/o General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Court of Veterans Appeals

Melanie G. Dorsey
Executive Officer
Clerk of the Court

1625 K Street, N.W. -- Suite 400
Washington, D.C. 20006

January 30, 1990

MEMORANDUM

FROM: Melanie G. Dorsey, Executive Officer and
Clerk of the Court

RE: No. 89-150 - Gordon B. Skinner v. Edward J. Derwinski, Secretary of Veterans Affairs

Attached is a per curiam order of the Court that consists of an amendment of this Court's opinion in the above referenced case released on January 29, 1990. Please be advised that a concurring opinion by Associate Judge Kenneth Kramer will be forthcoming.

Note: Pursuant to Pub. L. No. 100-687, title III, § 4067(d)(2), this decision will become the decision of the Court thirty days from the date hereof.

U.S. COURT OF VETERANS APPEALS
FILED
JAN 29 1990

UNITED STATES COURT OF VETERANS APPEALS

No. 89-150

GORDON B. SKINNER, APPELLANT,

v.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Response to an Order to Show Cause Why the Appeal Should Not be Dismissed.

(Submitted December 26, 1989 Decided January 29, 1990)

Gordon B. Skinner, *pro se*, for Appellant.

No appearance was entered on behalf of the Secretary of Veterans Affairs.

Before NEBEKER, Chief Judge, and KRAMER, and FARLEY, Associate Judges.

NEBEKER, Chief Judge: Appellant, Gordon B. Skinner, has noted an appeal from the Board of Veterans' Appeals' (BVA) denial of his claim for service connected benefits relating to arthritis in his left knee. We dismiss for lack of jurisdiction.

From the Notice of Appeal the following dispositive facts appear: Claimant filed a Notice of Disagreement on February 16, 1988, objecting to the decision of the Department of Veterans Affairs Regional Office. The BVA reviewed claimant's case and mailed notice of its decision on December 20, 1989. Claimant filed his Notice of Appeal with this Court on December 26, 1989.

The United States Court of Veterans Appeals derives its jurisdiction exclusively from the statutory grant of authority provided by Congress in the Court's enabling legislation. See Veterans' Judicial Review Act, Pub. L. No. 100-687, title III.

The Act provides, "The United States Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." Pub. L. No. 100-687, title III, § 4052(a). However, the Act limited the Court's jurisdiction to cases in which a Notice of Disagreement is filed on or after November 18, 1988, by providing that the Veterans' Judicial Review Act "shall apply with respect to any case in which a notice of disagreement is filed . . . on or after the date of the enactment of this Act [November 18, 1988]." Pub. L. No. 100-687, title IV, § 402.

It is rudimentary law that in order for any court inferior to the Supreme Court of the United States to exercise jurisdiction it must have been supplied by an act of Congress. Finley v. United States, 109 S.Ct. 2003, 2006 (1989) (citing The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868)). This proposition applies with equal force to courts created under both Article III and Article I of the United States Constitution. As early as 1807 the Supreme Court noted that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." Id. at 2005 (citing Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93 (1807)). More recently, the Supreme Court noted that courts may not in any case, even in the interest of justice, extend their jurisdiction where none exits. Christianson v. Colt Industries Operating Co., 108 S.Ct. 2166, 2178 (1988).

The jurisdiction conferred upon the United States Court of Veterans Appeals is expressly limited to claims where the Notice of Disagreement was filed on or after November 18, 1988. In the present case, appellant's Notice of Disagreement was filed on February 16, 1988. Because the Notice of Disagreement predates November 18, 1988, the Court is without jurisdiction to review the decision of the BVA.

Accordingly, the appeal is dismissed for lack of jurisdiction.

March 26, 1990

MEMORANDUM

FROM: James L. Caldwell, Jr., Chief Deputy Clerk

RE: No. 89-150 - Gordon B. Skinner v. Edward J. Derwinski, Secretary of Veterans Affairs

Attached is a memorandum from Associate Judge, Kenneth B. Kramer, in which he indicates that he has decided not to issue a concurring opinion in the above cited case. This retracts Judge Kramer's earlier indication that he would issue a concurring opinion in Skinner, as noted in Ms. Dorsey's January 30, 1990, memorandum (attached).

Attachments

cc: Mike Carmichael
Maria Ryan

To: Chief Judge Nebeker
Associate Judge Farley
From: Associate Judge Kramer
Date: March 23, 1990
Re: Skinner v. Derwinski, No. 89-150

After considerable reflection based on your comments and those of M.E. Witkin in his Manual on Appellate Court Opinions, I have decided not to author a concurring opinion in the above cited case.

✓copy: Melanie Dorsey
Clerk of the Court

UNITED STATES COURT OF VETERANS APPEALS

U.S. COURT OF VETERANS APPEALS
FILED
FEB 23 1990
Clerk

No. 89-14

JEAN A. ERSPAMER, PETITIONER

v.

EDWARD J. DERWINSKI, Secretary of
Veterans Affairs, et al., RESPONDENTS,

On Petitioner's Request for Writ of
Mandamus, Prohibition or Certiorari

(Argued February 7, 1990 Decided February 23, 1990)

G. Brian Busey and Tamar R. Schwartz, for Petitioner Jean A. Erspamer.

Raoul L. Carroll and Pamela L. Wood, for Respondent Secretary of Veterans Affairs.

Before NEBEKER, Chief Judge, KRAMER and FARLEY, Associate Judges.

Opinion for the court filed by Associate Judge FARLEY.

FARLEY, Associate Judge: As the decade of the 1970's was ending, Ernest G. Erspamer sought disability compensation from the Veterans Administration (VA), claiming that the leukemia he was suffering from was service-connected. Now, as the decade of the 1990's begins, Mr. Erspamer's claim and that of his widow, petitioner herein, have yet to be resolved by the Department of Veterans Affairs (DVA), the successor to the VA. Urging that this delay of over ten years has been unreasonable, petitioner asks that this court compel action on the claims by exercising jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), and issuing an extraordinary writ to the appropriate official or officials of the DVA.

In response, the DVA takes the position that this court lacks the jurisdiction necessary to issue the extraordinary relief requested by petitioner. We disagree. For the reasons set forth below, we hold that this court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), to entertain petitioner's request. We further hold that the facts and circumstances presented by petitioner, and not disputed by respondent, present the type of situation which would warrant the granting of extraordinary relief. However, based upon the written and oral representations of counsel for respondent that the situation will soon be resolved, we decline petitioner's invitation to grant the requested relief at this time but will retain jurisdiction of this case pending future order of the court.

I.

On April 14, 1947, Ernest G. Erspamer filed an initial claim for disability compensation stemming from his exposure to ionizing radiation while serving as hydrographic survey officer on the USS BOWDITCH during Operation Crossroads at the Bikini Atolls from August 1946 through September 1946. The claim was denied by the VA on October 7, 1947, with the statement that service connection of the "residuals of Exposure to Radio Activity [sic] as claimed by you was not shown by the evidence of record." Verified Petition at 3.

Having been diagnosed as suffering from chronic myelogenous leukemia, the claimant reopened his claim for service-connected benefits by a letter to the VA Regional Office in St. Paul, Minnesota, dated June 25, 1979. Additional exposure to ionizing radiation is also claimed to have resulted from February 16, 1963, to March 2, 1963, and from February 29, 1964, to March 13, 1964, at the United States Army Chemical School, Fort McClellan, Alabama. Mr. Erspamer died on December 13, 1980, and shortly thereafter, petitioner herself submitted a claim for service-connected death benefits and continued to pursue her husband's original claim for accrued disability benefits. The St. Paul Regional Office denied the claims on May 19, 1981. On June 12, 1981, petitioner filed a Notice of Disagreement and subsequently perfected her appeal to the Board of Veterans Appeals (BVA).

Petitioner's first appeal was heard by a traveling section of the BVA in San Francisco, California, on February 26, 1982. On August 29, 1982, the BVA denied the appeal. On April 27, 1983, petitioner moved for reconsideration of the claim. On March 1, 1984, a traveling BVA section heard petitioner's motion for reconsideration as well as her alternative request to reopen the claim due to new and material evidence. On November 15, 1984, the BVA remanded petitioner's claim to the Regional Office in San Francisco, California, with instructions that all available evidence of exposure be gathered and that an independent expert conduct a dose reconstruction of the radiation to which the veteran was exposed.

On September 6, 1986, without having arranged for the mandated independent dose reconstruction or gathered all of the requested evidence, the Regional Office issued a supplemental statement of the case. On October 26, 1986, the petitioner's claim was resubmitted to the BVA.

On April 29, 1987, the BVA issued the second remand order and again directed that the Regional Office hire an independent expert to reconstruct the dose of ionizing radiation to which the veteran was exposed. In addition, the second remand order prescribed specific action to be taken with respect to the gathering of the records of the veteran's exposure at Fort McClellan and how this information should be processed in the VA. The BVA specifically stated that "the case should be forwarded to the Chief Benefits Director for referral to an independent expert, selected by the Director of the National Institutes of Health . . . ." BVA Decision April 29, 1987, at 7 (Exhibit B of Verified Petition). Upon completion of the independent review, "the Chief Benefits Director should review the case . . . . The case should then be reconsidered by personnel of the [Regional Office]." Id. at 8. Noting that petitioner's claim had been pending "for such a prolonged period of time," the BVA's second remand order requested that the steps be taken as "expeditiously as possible" and it further directed that petitioner be advised of each development as it occurs. Id. at 5.

Almost three years have passed since the second remand by the BVA. Petitioner has not been advised of any progress, despite over thirty letters to the VA requesting action. On December 11, 1989, petitioner sought a writ from this court directing compliance with the second BVA remand within sixty days, ordering that the DVA pay a reasonable fee to an independent expert, prohibiting the DVA from preventing the independent expert from contacting petitioner, and an award of attorneys' fees and costs. The case was fully briefed and oral argument, the first before this court, was held on February 7, 1990.

II.

The threshold question for this court to determine is whether it has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), to grant the extraordinary relief requested by petitioner. The All Writs Act provides that

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a).

The United States Court of Veterans Appeals is a "court[] established by Act of Congress." Section 4051 of the Veterans Judicial Review Act of 1988 (VJRA), Pub. L. 100-687, Title III, Sec.301, 102 Stat. 4113, provides that "[t]here is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Veterans Appeals." Article I courts are empowered to exercise jurisdiction under the All Writs Act. See, e.g., Noyd v. Bond, 395

U.S. 683, 695 n.7, 89 S.Ct. 1876, 1883, 23 L.Ed.2d 631 (1969) (United States Court of Military Appeals,; United States v. Frischholz, 16 C.M.A. 150, 36 C.M.R. 306 (1966) (United States Court of Military Appeals); Alberta Gas Chemicals, Inc. v. United States, 496 F. Supp. 1332, 1335-36 (Cust. Ct. 1980) (United States Customs Court, which, in 1980, became the United States Court of International Trade); Yaeger v. Greene, 502 A.2d 980, 983 (D.C. 1985) (District of Columbia Court of Appeals); Margolis v. Banner, 599 F.2d 435 (C.C.P.A. 1979) (United States Court of Customs and Patent Appeals, which, in 1982, became the United States Court of Appeals for the Federal Circuit).

Congress specifically provided that this court would "have such assistance in carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States." 38 U.S.C.A. § 4065(b) (West Supp. 1989). Moreover, it is clear that Congress intended that this court have and, in appropriate instances, use jurisdiction under the All Writs Act. enator Alan Cranston, Chairman of the Senate Committee on eterans' Affairs, in his summary of the House and Senate mpromise agreement, which was submitted in lieu of a conference mittee report, stated:

> [O]ne of the powers that this new article I court, like any other U.S. court, would have is the power to issue whatever writs are necessary to conduct its business. Section 1651 of title 28, United States Code, provides:
>
> > The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

> I would expect the court to utilize this power when it [is] . . . necessary for it to do so in order for justice to prevail.

134 CONG. REC. S16648 (daily ed. October 18, 1988) (statement of Sen. Cranston). Similar remarks endorsing this court's All Writ Act authority were made by Representative Don Edwards during the debate in the House of Representatives over the VJRA. 134 CONG. REC. H10359 (daily ed. October 19, 1988) (statement of Rep. Edwards).

Despite the confirmation of the authority of this court to exercise All Writs Act jurisdiction by the terms of the All Writs Act itself, the plain language and legislative history of the VJRA, and the case law on Article I courts, respondent nevertheless takes the position that such jurisdiction is lacking. Without benefit of citation to any relevant authority, respondent argues that it cannot be the subject of the All Writs Act jurisdiction of this court because the DVA is an executive agency, not an inferior judicial tribunal. We disagree. The authority for the issuance of extraordinary writs by "[t]he Supreme Court and all courts established by Act of Congress" to officials of administrative and executive agencies has been firmly entrenched in American jurisprudence from its earliest days. See, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803); Kendall v. United States, 37 U.S. (12 Pet.) 524, 9 L.Ed. 1181 (1838).

The All Writs Act provides that courts may issue writs "in aid of their respective jurisdictions." This plain language does not limit the issuance of such writs to inferior courts. As Judge Edwards has noted, "[t]he authority of an appellate court to issue mandamus to an agency is analogous to its authority to issue the writ to District Courts." Telecommunications Research and Action Center, et al.,("TRAC") v. FCC, 750 F.2d 70, 76 n.28 (D.C. Cir. 1984) (citing Association of National Advertisers v. FTC, 627 F.2d 1151, 1179 (D.C. Cir. 1979), cert. denied, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980) (Leventhal, J., concurring)).

Congress vested exclusive jurisdiction over the review of BVA decisions in this court. See, 38 U.S.C.A. § 4052(a) (West Supp. 1989); 38 U.S.C. § 211. Furthermore, as noted above, Congress emphasized in statutory form and in legislative history that this court has jurisdiction to issue extraordinary writs under the All Writs Act. In so doing, Congress was well aware that the All Writs Act jurisdiction of this court, if exercised at all, would be directed to officials of the DVA rather than to a judicial tribunal. In a subsequent amendment to the VJRA, Congress specifically provided that the appellate jurisdiction of this court would be extended to include compulsion of action "unreasonably delayed" by the Secretary. 38 U.S.C.A. § 4061(a) (West Supp. 1989) as amended by The Veterans' Benefits Amendments of 1989, Pub. L. 101-237, 103 Stat. 2062. In addition to being contrary to established law, a decision that this court lacked jurisdiction to issue extraordinary writs to officials of the DVA merely because the DVA was an executive agency would frustrate the letter and the spirit of the VJRA. Moreover, such a decision would frustrate the

Congressional desire for judicial review where, as is alleged here, the inadvertent or intentional failure of the DVA to act prevents a claimant from ever attaining a BVA decision which would be subject to review.

We hold, therefore, that this court has jurisdiction to issue extraordinary writs to officials of the DVA. However, in so doing, this court recognizes that the circumstances that would justify the issuance of such a writ must be compelling. As Judge, now Justice, Kennedy has observed:

> . The preemptory writ of mandamus has traditionally been used in federal courts to review nonfinal district court orders and is used only in exceptional circumstances. (citations omitted). Use of the All Writs Act in connection with agency matters has been even more rare and the scope of relief granted in these cases has been narrow. (citations omitted). The circumstances that will justify our interference with nonfinal agency action must be truly extraordinary, for this court's supervisory province as to agencies is not as direct as our supervisory authority over trial courts. (citations omitted).

Public Utility Commissioner of Oregon v. Bonneville Power Administration, 767 F.2d 622, 630 (9th Cir. 1985).

Respondent also argues that we lack All Writs Act jurisdiction over this case because the appellate jurisdiction of this court extends only to claims in which the Notice of Disagreement was filed on or after November 18, 1988. VJRA, Sec. 402. Since petitioner's Notice of Disagreement was filed on June 12, 1981, respondent argues, this court, lacking appellate jurisdiction over the claims, also lacks All Writs Act jurisdiction. Again, we must disagree. Respondent reads the All Writs Act and the term "jurisdiction" too narrowly; the substantial body of case law supports a broader interpretation.

It is true that the All Writs Act only empowers a court to act "in aid of [its] . . . jurisdiction[]," 28 U.S.C. § 1651(a), and the Act cannot be used to expand the statutory jurisdiction of a court. See, 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice, ¶ 100.26 (2d ed. 1948 & Supp. 1989). However, All Writs Act jurisdiction extends beyond pending cases; it embraces the prospective and potential jurisdiction of a court as well. As the Supreme Court has held: "The exercise of this [All Writs Act] power . . . extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." FTC v. Dean Foods Co., 384 U.S. 597, 603-604, 86 S.Ct. 1738, 1742-1743, 16 L.Ed.2d 802 (1966) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943)). See, In the Matter of a Letter From: Michael Quigley, No. 89-61 (U.S. Court of Veterans Appeals January 22, 1990).

All Writs Act jurisdiction is particularly applicable where, as here, an alleged refusal to act would forever frustrate the ability of a court to exercise its appellate jurisdiction. "The court clearly has the power to issue writs under the All Writs Act in aid of its prospective appellate jurisdiction in the face of action . . . that would frustrate such prospective appellate jurisdiction." Margolis v. Banner, 599 F.2d at 440-441. "There is no doubt that this court has present jurisdiction to hear claims concerning nonfinal agency action (or inaction) that might affect our future statutory review of final agency action." TRAC, 750 F.2d at 79.

The question, therefore, is whether, under the circumstances of this case, this court has jurisdiction to act in aid of its "prospective" or "potential" appellate jurisdiction. We conclude that we have such jurisdiction.

A continuation of the ten year delay in resolving petitioner's claim and the inadvertent or intentional failure to comply with the remand orders of the BVA could well serve to frustrate the potential or prospective appellate jurisdiction of this court. It is neither possible nor necessary to discuss every conceivable way in which this court might be called upon to consider this case in the exercise of its appellate jurisdiction. A few examples will suffice, although it must be noted that in raising possibilities, this court takes no position on their efficacy.

The trigger for a Notice of Disagreement is an adjudication decision. In this case, it was the May 19, 1981, denial of benefits which triggered the original Notice of Disagreement filed by petitioner. In view of the two BVA remands for the development of additional evidence, there is real potential that there will be a subsequent adjudication. Indeed, 38 U.S.C.A. § 3008 (West Supp. 1989) specifically provides that "[i]f new and material evidence is presented or secured with respect to a claim which has been disallowed, the [Secretary] shall reopen the claim and review the former disposition of the claim." Similarly, should it be determined that there was "clear and unmistakable error," 38 C.F.R.

§ 3.105 (1988), in the original adjudication, petitioner's claim could be reopened. In either event, a new adjudication decision might give rise to a new Notice of Disagreement over which this court could have appellate jurisdiction.

Moreover, as we are advised by counsel for respondent, it "happens a lot" that Regional Offices change adjudication decisions when claims are remanded by the BVA. Hearing of February 7, 1990, transcript at 73. If a claim were to be granted, of course, that would be the end of the matter. If however, benefits are denied or only partially granted, a new Notice of Disagreement might be filed, and, again, an appeal could be within the appellate jurisdiction of this court.

Petitioner could also file a new Notice of Disagreement based upon the original 1981 adjudication decision and attempt to pursue a second appeal before the termination of the adjudication process presently in progress. Although such a Notice of Disagreement might well be deemed to be jurisdictionally defective, this court would certainly have appellate jurisdiction to make such a determination, as counsel for respondent agreed during argument.

It is impossible for this court to predict what course petitioner's claim might follow in the future and there is nothing to be gained by engaging in such an exercise. For the resolution of the question at bar, it is sufficient to note only that the inadvertent or intentional administrative delay by the DVA directly and adversely effects the potential and prospective appellate jurisdiction of this court. We hold, therefore, that this court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a), to entertain this petition in aid of its prospective appellate jurisdiction.

III.

It must next be determined whether the relief requested by petitioner is warranted in this case. Mindful that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations," Kerr v. United States District Court, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976), we turn to the two-prong test for its application. Before a court may issue a writ of mandamus, petitioners must show: (1) that they are clearly entitled to the writ; and (2) they lack adequate alternative means to obtain the relief they seek.

Petitioner first has "the burden of showing that [her] right to issuance of the writ is 'clear and indisputable.'" Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953) (quoting United States v. Duell, 172 U.S. 576, 582, 19 S.Ct. 286, 287, 43 L.Ed. 559 (1899). Just over a century ago, the Supreme Court discussed the issue presented by petitioner:

> The court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, . . . a mandamus may be issued to compel them. (emphasis added).

United States v. Black, 128 U.S. 40, 48, 9 S.Ct. 12, 14, 32 L.Ed.

354 (1888). In Black, the Supreme Court affirmed the denial of the writ of mandamus because, unlike here, it concluded that the official "did not refuse to act or decide. He did act and decide." Id.

Petitioner does not seek to compel a specific type or character of a decision; she asks only that, after ten years, a decision be made.

> [C]laims of unreasonable delay fall within the narrow class of interlocutory appeals from agency action over which we appropriately should exercise our jurisdiction. By definition, a claim of unreasonable delay cannot await final agency action before judicial review, since it is the very lack of agency action which gives rise to the complaint. It is also obvious that the benefits of agency expertise and creation of a record will not be realized if the agency never takes action. In addition, judicial review of claims of unreasonable delay do not prematurely inject the courts into the agency's consideration of the merits of the issue before it. Finally, agencies operate under a mandate to decide matters in a reasonable time, (footnote omitted) and Congress has instructed statutory review courts to compel agency action which has been unreasonably delayed (footnote omitted).

Air Line Pilots Association, International, et al. ("ALPA") v. CAB, 750 F.2d 81, 85 (D.C. Cir. 1984); see also, TRAC, 750 F.2d at 79.

It remains to be determined whether the delay of over a decade in this case has been unreasonable. There is no standard of measurement or scale which can be used to make such a determination. In Silverman v. NLRB, 543 F.2d 428 (2d Cir. 1976), a panel of the Second Circuit held that a delay of five years was clearly unreasonable whereas a panel of the D.C. Circuit later ruled that a five year delay was "not so great as to justify" mandamus. In Re Monroe Communications Corp., 840 F.2d 942, 943

(D.C. Cir. 1988). Four years earlier, yet another panel of the D.C. Circuit had ruled that "a five year delay in adjudicating claims for a form of unemployment assistance payments would be difficult to justify under any set of circumstances." ALPA, 750 F.2d at 86 (emphasis in original). In this context, the D.C. Circuit has commented that:

> [D]elays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (citations omitted) . . . the court should also take into account the nature and extent of the interests prejudiced by delay, (citation omitted); and the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'" (citation omitted).

TRAC, 750 F.2d at 80.

Claims for benefits due to military service clearly implicate human health and welfare concerns as distinguished from economic regulation. In consideration of the "nature and extent of the interests prejudiced by delay," we must reject the suggestion made by counsel for respondent at argument that any and all prejudice resulting from the decade's delay would be offset by retroactive payment should the DVA ultimately determine that benefits were warranted. Payment of benefits ten years after they were due could never serve as full compensation. Moreover, the interests resulting from delay here transcend those just of the petitioner. "Quite simply, excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans." Potomac Electric Power Company v. ICC, 702 F.2d 1026, 1034 (D.C.

Cir. 1983). Public confidence is particularly sapped where, as here, the delay results from the failure of one component of an agency to comply with the authorized mandate(s) of an office of the same agency speaking with the express authority of the head of the agency.

"While there is no absolute definition of what is reasonable time, we know that it may encompass 'months, occasionally a year or two, but not several years or a decade.'" Community Nutrition Institute v. Young, 773 F.2d 1356, 1361 (D.C. Cir. 1985) (quoting MCI Communications Corp. v. FCC, 627 F.2d 322, 340 (D.C. Cir. 1980). Based upon the facts presented by petitioner, and not disputed by respondent, we hold that there has been an unreasonable delay in the determination of petitioner's claims and in the compliance with the 1984 and 1987 remands of the BVA. Petitioner has carried "the burden of showing that [her] right to issuance of the writ is 'clear and indisputable.'" Bankers Life and Casualty Co. v. Holland, 346 U.S. at 384, 74 S.Ct. at 148 (quoting United States v. Duell, 172 U.S. 576, 582, 19 S.Ct. 286, 287, 43 L.Ed. 559 (1899)).

This showing, standing alone, is not enough. "To ensure that mandamus remains an extraordinary remedy, [the] petitioner[] must show that [she] lack[s] adequate alternative means to obtain the relief [she] seek[s]." Mallard v. United States District Court for the Southern District of Iowa, __ U.S. __, 109 S.Ct. 1814, 1822, 104 L.Ed.2d 318 (1989) (citing Kerr v. United States District Court, 426 U.S. at 402-403, 96 S.Ct. at 2123-2124); Allied Chemical

Corp. v. Daiflon, Inc., 449 U.S. 33, 35, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980); In the Matter of a Letter From: Michael Quigley, No. 89-61 (U.S. Court of Veterans Appeals January 22, 1990).

The only avenue arguably still available to petitioner, the procedures for which do not appear in any DVA regulation or rule, would be a plea directly to the Secretary. At oral argument, the petitioner stated, and respondent conceded, that over the course of the five years that the remand orders have been pending, petitioner through counsel has written between 30 and 40 letters to the Regional Office. This fruitless effort serves to indicate that the petitioner has done all that she could to bring this matter to the attention of the DVA. Moreover, counsel for the respondent agreed during oral argument that this petition for relief in and of itself is enough to bring this matter to the attention of the Secretary and effectively serves, in this case, to exhaust that administrative remedy.

In view of the circumstances and the history of this case, requiring that the petitioner write directly to the Secretary of Veterans Affairs would be "tantamount to having petitioner[] do a useless act." Margolis v. Banner, 599 F.2d at 443. We hold, therefore, that petitioner has effectively exhausted any and all alternative means to obtain the relief she seeks.

Although petitioner appears to have satisfied the test for the relief sought, there are additional factors presented by this case which counsel hesitation. In the first place, there have been significant changes in the organization and structure of the agency since the second BVA remand of April 29, 1987. On March 15, 1989, the Veterans Administration was raised to Department status and the Administrator was elevated to Cabinet rank, becoming the Secretary of Veterans Affairs. 38 U.S.C.A. (West Supp. 1989) § 201, Pub. L. 100-527, 102 Stat. 2635. This Secretary has not had the opportunity, based upon the record before this court and statements at oral argument, to address the delays of the Regional Office in complying with the remand orders of the BVA.

In addition, we now have the assurance of counsel for respondent that "[t]he factual development required by [the] BVA is currently in progress." Respondent's Memorandum of Points and Authorities in Opposition to Petition and In Response to Petitioner's Supplemental Memorandum at 7. Moreover, counsel has assured the court during argument that "now that we are aware of this case and the delays that are taking place, I think I can safely say that we will do what we can to expedite the process." Hearing of February 7, 1990, transcript at 60. Indeed, counsel for respondent suggested that this court defer action for six months, noting that "[t]he process may well be . . . complete by then." Id. at 66.

Ten years is an undeniably, and unacceptably, long time to have passed since the petitioner's husband first filed the claim for benefits with the VA. The delays have benefited neither the parties nor the public and they cannot be permitted to continue. The petitioner has the right to a decision on her claim. However, based upon the representations of counsel for respondent and in recognition of the truly extraordinary nature of the relief requested, this court will refrain from granting the relief at this time but will retain jurisdiction of the case pending future order of the court. Petitioner may renew her request in six months if respondent is unable to adhere to the timetable suggested by its counsel. See, In Re Monroe Communications Corp, 840 F.2d at 943; TRAC, 750 F.2d at 81.

IV.

One technical issue remains. A decision by a single judge or a panel of this court in a case heard and determined in the exercise of our appellate jurisdiction, 38 U.S.C.A. § 4052 (West Supp. 1989), does not become "the decision of the Court" until thirty days have passed. 38 U.S.C.A. § 4067 (West Supp. 1989).

The instant case was heard not in the exercise of our appellate jurisdiction but pursuant to the All Writs Act, 28 U.S.C. § 1651(a), which does not provide for any waiting period or delay. Indeed, the nature of the jurisdiction exercised and the remedy sought by petitioner is such that a thirty day waiting period would frustrate the purposes of the extraordinary remedies contemplated by the All Writs Act. To impose an additional delay upon the administration of justice would be unfair and illogical.

We hold therefore that this decision, and all decisions of this court in the exercise of the jurisdiction conferred by the All

Writs Act, are effective immediately and not subject to the 30 day delay imposed by 38 U.S.C.A. § 4067 (West Supp. 1989). Cf., Robinson v. United States, 272 F.2d 554 (D.C. Cir. 1959).

V.

In accordance with the foregoing opinion, we hold that this court has jurisdiction under the All Writs Act, 28 U.S.C. §1651(a), to consider this petition in aid of our potential or prospective jurisdiction. We hold further that the decade of delay by the Veterans Administration, and its successor, the Department of Veterans Affairs, in acting upon the claims submitted by petitioner and her husband has been unreasonable and that petitioner has exhausted all available alternative remedies. However, we decline to issue extraordinary relief at this time and deny the request for attorneys' fees and costs in view of to the representations of counsel for respondent that a resolution may be near. The court will retain jurisdiction pending future order of the court and petitioner may seek appropriate relief six months from the date of this decision if respondent is unable to adhere to timetable suggested by its counsel. This constitutes the decision of the court and is effective immediately.

It is so Ordered.

Note: Pursuant to 38 U.S.C.A. § 4067(d)(2) (West Supp. 1989), this decision will become the decision of the Court thirty days from the date hereof.

U.S. COURT OF VETERANS APPEALS
FILED
MAR 9 1990
Clerk

UNITED STATES COURT OF VETERANS APPEALS

No. 89-126

RIGOBERTO MORALES TORRES, APPELLANT,

v.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appellee's Motion to Dismiss
for Lack of Jurisdiction

(Submitted January 29, 1990 Decided March 9, 1990)

Rigoberto Morales Torres, pro se, for Appellant.

Jacqueline E. Monroe, with whom *Raoul L. Carroll*, General Counsel, *Andrew J. Mullen*, Acting Assistant General Counsel, and *Pamela L. Wood*, Deputy Assistant General Counsel, were on the Motion to Dismiss, for Appellee.

Before NEBEKER, *Chief Judge*, and KRAMER and FARLEY, *Associate Judges*.

NEBEKER, *Chief Judge*: The Secretary of Veterans Affairs (Secretary) moves to dismiss appellant's (Mr. Torres') appeal, asserting that the Court is without jurisdiction because the Notice of Appeal was not timely filed. We deny the Secretary's Motion to Dismiss and hold that Mr. Torres' efforts to note his appeal were adequate and timely under the circumstances.

The Board of Veterans' Appeals (BVA) mailed to Mr. Torres notice of its decision on July 18, 1989. By letter dated July 27, 1989, Mr. Torres wrote to his Regional Office in San Juan, Puerto Rico, wherein he stated, "I strongly disagree" with the

BVA decision. On October 2, 1989, the Regional Office wrote a letter to Mr. Torres, which stated in part that "[t]here is as yet no mailing address for the Court [of Veterans Appeals], and rules of practice to govern procedural matters have not been issued."

By letter dated October 4, 1989, Mr. Torres wrote to the Regional Office stating, "I request a full reconsideration by the Judicial Court." Additionally, he requested that the Regional Office forward his notice to the Court, which the Regional Office did not do. The Regional Office mailed the Court's address to Mr. Torres on November 14, 1989, the date on which a legislative extension for filing the Notice of Appeal expired. *See* Court of Veterans Appeals Judges Retirement Act, Pub. L. No. 101-94, § 202, 1989 U.S. Code Cong. & Admin. News (103 Stat.) 617, 626. On October 16, 1989, the Court published notice that it had commenced operations. *See* 54 Fed. Reg. 42,437 (1989).

On November 16, 1989, Mr. Torres mailed to the Court his notice requesting review of the BVA decision. The notice was received by the Clerk of the Court on November 20, 1989, five days after the 120-day time for filing pursuant to 38 U.S.C.A. § 4066(a) (West Supp. 1989) (the statute), and six days after the extension for filing expired.

The question we decide is whether during the formative period of the Court, before it had physical facilities and rules of appellate procedure, a timely written expression of a desire for judicial review submitted to a claimant's regional office is adequate as a substitute notice of appeal. We hold that it is, and that Mr. Torres' efforts to note the appeal were adequate.

The statute requires that a person bringing an appeal to the Court "must file a notice of appeal with the Court. . . . within 120 days after the date on which notice of the [BVA] decision is mailed." *Id.* The statute alone controls whether Mr. Torres' notice was timely filed. Congress designated the Federal Rules of Appellate Procedure as the interim rules of the Court to the extent to which they are consistent with the statute. *See* Pub. L. No. 101-94, § 203. However, Rule 3 governing the filing of notices of appeal is inconsistent, and therefore, inapplicable. *Compare* 38 U.S.C.A. § 4066(a) (notice of appeal must be filed with the Court within 120 days) *with* Fed. R. App. P. 3 and 4 (notice of appeal must be filed with the clerk of the district court within 60 days if the United States or an officer or agency thereof is a party). Furthermore, the Court's Interim General Rules did not become effective until December 18, 1989. *See* Order of the Court (November 21, 1989). Therefore, before December 18, 1989, the statute alone governed the filing of the Notice of Appeal.

The timely filing of a notice of appeal is "mandatory and jurisdictional." *United States v. Robinson*, 361 U.S. 220, 224, 229 (1960). The imperative language of the statute demonstrates that the requirement is jurisdictional in this case as well.

However, "literal compliance [with filing requirements is not required] in cases in which it cannot fairly be exacted."

Fed. R. App. P. 3 advisory committee's note. In this case, the Court's address was not available when Mr. Torres expressed a desire for judicial review. Because the Court had no antecedent, there was not even a former address to which Mr. Torres could have sent his notice. Under these circumstances, which can only arise at the initial phase of a court's operation, literal compliance with the statute was impossible.

Our interpretation of the statute can be governed by *Houston v. Lack*, 108 S.Ct. 2379 (1988), where the Supreme Court held that a *pro se* effort to note an appeal outside traditional court facilities was sufficient to begin the appeal process.

In our opinion, under the circumstances of this case Mr. Torres' efforts are sufficiently comparable to the petitioner's efforts in *Houston*. Mr. Torres had 120 days after the date on which notice of the BVA decision was mailed to file a Notice of Appeal but was told by the DVA that there was no place to file it. Under these circumstances, he filed in the best manner he could by mailing his notice to the DVA--the entity whose address he knew, who he believed would forward it to the Court as he had requested, and who had a statutory duty to assist him in other matters. *See* 38 U.S.C. § 240 (1982); 38 U.S.C.A. § 3007(a) (West Supp. 1989).

We, therefore, hold that where the address of the Court was not available, a written expression of dissatisfaction with the BVA's decision and a desire for judicial review delivered to the DVA for forwarding to the Court is efficacious if delivered to the DVA within the time prescribed for filing a Notice of Appeal. The Notice of Appeal is deemed timely filed.

We announce, however, that since December 18, 1989, "[t]o be timely filed, the Notice of Appeal must be *received* by the Clerk" of the Court within 120 days after the date on which notice of the BVA's decision was mailed. COVA R. 4 (emphasis added). Since December 18, 1989, both the Court's rules and address have been available to all persons who may wish to bring an appeal to this Court.

Note: Pursuant to 38 U.S.C.A. § 4067(d)(2) (West Supp. 1989), this decision will become the decision of the Court thirty days from the date hereof.

U.S. COURT OF VETERANS APPEALS
FILED
MAR 9 1990
Clerk

UNITED STATES COURT OF VETERANS APPEALS

No. 89-23

ALBERT A. MOKAL, PETITIONER,

v.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

On a Petition for a Writ of Mandamus

(Submitted December 4, 1989 Decided March 9, 1990)

Marie E. Marlow, Petitioner's custodian, for Petitioner.

Thomas A. McLaughlin, with whom *Raoul L. Carroll*, General Counsel, *Andrew J. Mullen*, Acting Assistant General Counsel, and *Pamèla L. Wood*, Deputy Assistant General Counsel were on Respondent's Answer to Petition and Supplemental Memorandum, for Respondent.

Before NEBEKER, *Chief Judge*, and KRAMER and FARLEY, *Associate Judges*.

NEBEKER, *Chief Judge*: Petitioner's daughter Marie E. Marlow, who is acting as his custodian, sent a letter to the Court, which we treat as a petition, requesting that the Court preempt the appeal process within the Department of Veterans Affairs (DVA) and assume jurisdiction over the petitioner's claim under the All Writs Act, 28 U.S.C. § 1651 (1982). In the alternative, petitioner requested that the Court issue a writ of mandamus compelling the Regional Office of the DVA to issue a delayed Statement of the Case, the document required to secure review before the Board of Veterans' Appeals (BVA).

Before the Court ruled on the petition, the Regional Office issued the Statement of the Case. The Secretary contended, without supporting analysis, that the request for a writ should be dismissed because the controversy giving rise to the request had been resolved and the question was moot. He also contended that the Court lacked authority to assume jurisdiction and adjudicate petitioner's claim on the merits. Subsequently, the Court requested the Secretary to elaborate on the mootness of the petition and the application of the Article III case or controversy stricture of the Constitution by this Article I Court.

In a footnote, the Secretary also questioned, without citation of support, Mrs. Marlow's authority to file an action in petitioner's behalf. She responded that the forms she filed with the DVA authorizing her to receive DVA funds for petitioner, as well the DVA instructions that specify who may represent a claimant in an appeal to the BVA, authorize her to appeal to the Court. She also contends that the Statement of the Case issued by the Regional Office is substantively defective and again asks the Court to preempt the BVA and hear the case on its merits.

We hold that a custodian's authority to represent a claimant before the DVA also permits prosecution of proceedings before this Court. We also hold that the Court will adhere to the case or controversy jurisdictional restraints adopted by Article III courts and we dismiss the petition for a writ of mandamus as moot. We need not consider the merits of petitioner's argument with respect to the underlying case because petitioner has not exhausted available administrative remedies.

As a preliminary matter, we note that the Court has authority to issue writs in aid of its jurisdiction. *Erspamer v. Derwinski*, No. 89-14 (U.S. Vet. App. Feb. 23, 1990); *In re Quigley*, No. 89-61 (U.S. Vet. App. Jan. 22, 1990); 28 U.S.C. § 1651 (1982). The Court has liberally construed petitioner's pleadings as requests for All Writs relief. Given the authority to entertain requests for All Writs relief, we must determine whether the petitioner's daughter has authority to file a petition on behalf of her father.

The rather bare contention that Mrs. Marlow lacks authority to press her father's claim in this Court fails when viewed against the purpose for creating the Court. Congress, in providing for judicial review of veterans' claims, conferred on the Court "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals," 38 U.S.C.A. § 4052 (West Supp. 1989), and provided that "a person adversely affected by [a final decision of the Board may] file a notice of appeal with the Court," 38 U.S.C.A. § 4066 (West Supp. 1989). These enactments do not differentiate between the review of claims brought directly by a claimant and those brought through a custodian.

Since Congress was aware that custodial representation of claimants was an established practice in veterans benefits matters, we see no reason to succumb to the Secretary's invitation to impede access of incompetents represented by recognized guardians to the Court. Indeed, to do so without some rational basis--not suggested by the Secretary--would be questionable as a due process denial, and would deny a disadvantaged class of claimants access to review in this Court. We hold that the recognized fiduciary relationship between a claimant before the DVA and a custodian--whether created under state law or by the Secretary--is sufficient to empower that custodian to pursue remedies before this Court.

We turn to the substantive issues of the petition. The Secretary argues that the controversy underlying the petition for a writ of mandamus is moot. He notes that Article III courts are prohibited by the case or controversy requirement from exercising judicial power over moot questions. He acknowledges that Congress may authorize Article I courts to perform functions denied Article III courts, but argues that the absence of specific authorization to issue advisory opinions precludes issuing such opinions. In addition, the Secretary suggests that other Article I courts, specifically the District of Columbia Court of Appeals and the United States Claims Court, have determined that the exercise of their power is limited to cases or controversies and urges the Court to follow their example.

The legislation that created the District of Columbia Court of Appeals, unlike the legislation that created the Court of Veterans Appeals, provided a basis for adopting a case or controversy requirement. *See United States v. Cummings*, 301 A.2d 229, 231 (D.C. 1973) ("D.C. Code 1967, § 11-705 (Supp. V, 1972) provides for the hearing of '[c]ases and controversies' by [the District of Columbia Court of Appeals]."). The Court of Claims, predecessor to the United States Claims Court, relied on Supreme Court decisions limiting the use of judicial power by Article III courts when it determined that the use of its power is limited to cases or controversies. *See Manufacturers Hanover Trust Co. v. United States*, 590 F.2d 893, 894 (Ct. Cl. 1978) (citing *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920)). We recognize that these courts adopted the case or controversy restraint based on sound policies and constitutional considerations, and while the Court of Veterans Appeals is not bound by the decisions of its sister Article I courts, we accord them great respect.

The Secretary's argument understandably shies away from a constitutional analysis of the nature of this Court's power as a court or tribunal established under Article I. 38 U.S.C.A. § 4051 (West Supp. 1989). It is little wonder, since the Supreme Court's decisions in this area "do not admit of easy synthesis." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847 (1986); *Northern Pipeline Constr. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982). The Article III case or controversy requirement specifically limits the exercise of the "judicial Power of the United States." U.S. Const. art. III, § 2. The Supreme Court has only applied the Article III case or controversy restraint to the exercise of judicial power by Article III courts. Whether a non-Article III body can exercise the judicial power has occupied the attention of the Supreme Court since Chief Justice Marshall introduced the question. *See American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1824). The latest chapter on the controversy was opened in *Palmore v. United States*, 411 U.S. 389 (1973).

In *Palmore* the Supreme Court expressly upheld the exercise of judicial power by an Article I court in a federal criminal case and observed that Congress was not limited to delegating judicial power to Article III courts, *Id.* at 400-01. Although *Palmore* has not been overruled, Justice Brennan, writing for a plurality in *Northern Pipeline*, would limit *Palmore* to its facts and readopt a literal interpretation of Article III in which "[t]he judicial power of the United States must be exercised by courts having the attributes prescribed by Art. III." 458 U.S. at 59. Since *Northern Pipeline*, the Supreme Court has adopted a balancing test and "declined to adopt formalistic and unbending rules" in determining the extent to which Congress can authorize "the adjudication of Article III business in a non-Article III tribunal." *Commodity Futures Trading Comm'n*, 478 U.S. at 851 (citing *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 587 (1985)). Post-*Northern Pipeline* majority opinions have not discussed the type of power exercised by non-Article III adjudicatory bodies.

We recognize the unsettled nature of the law in this area and do not attempt to resolve the controversy for purposes of this case. We do note, however, that the Court of Veterans Appeals exercises power comprising essential attributes of judicial power. *See Gordon v. United States*, 117 U.S. 697, 702 (1864). The Court has the power to render a judgment that will bind the rights of the parties litigating before it, 38 U.S.C.A. § 4052 (West Supp. 1989), award execution of a judgment, and adjudicate contempt, 38 U.S.C.A. § 4065 (West Supp. 1989).

Under these circumstances, it is sufficient to observe that we are granted power judicial in nature and being statutorily characterized as a "Court" we are free, in the absence of a congressional directive to the contrary, to adopt as a matter of policy the jurisdictional restrictions of the Article III case or controversy rubric. Since the controversy surrounding this petition is moot, *see State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973), we hold that the Court no longer has jurisdiction and the petition is dismissed insofar as it seeks mandamus relief.

Finally, petitioner asserts that the Statement of the Case the Regional Office issued is defective and asks the Court to preempt the BVA and hear the merits of his claim. Because petitioner has not exhausted administrative remedies available to him, the Court need not examine the substance of the Statement of the Case and will not preempt the BVA to hear the merits of the claim. We express no view on the power of the Court by certiorari, or otherwise, to preempt a demonstrably futile administrative review process. *See Erspamer v. Derwinski*, No. 89-14 (U.S. Vet. App. Feb. 23, 1990); *In re Quigley*, No. 89-61 (U.S. Vet. App. Jan. 22, 1990).

The request to preempt is denied.

So ordered.

*Note: Pursuant to 38 U.S.C.A. § 4067(d)(2)
(West Supp. 1989) this decision will become the
decision of the Court thirty days from the date hereof.*

U.S. COURT OF VETERANS APPEALS
FILED
MAY 23 1990
Clerk

UNITED STATES COURT OF VETERANS APPEALS

No. 89-54

LARRY KENDALL DOUB, APPELLANT,

V.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appellee's Motion to Dismiss for Lack of Jurisdiction

(Submitted March 16, 1990 Decided May 23, 1990)

Ralph F. Simpson and *Joseph I. Carter* for appellant.

Deborah W. Duckett, with *Raoul L. Carroll*, General Counsel, *Andrew J. Mullen*, Acting Assistant General Counsel, and *Pamela L. Wood*, Deputy Assistant General Counsel, for appellee.

Before NEBEKER, *Chief Judge*, and KRAMER and FARLEY, *Associate Judges*.

NEBEKER, *Chief Judge*: Appellant, Larry Kendall Doub, has noted an appeal from the Board of Veterans' Appeals' (BVA) denial of his claim for an increased disability rating relating to post-traumatic stress disorder (PTSD). We dismiss for lack of jurisdiction.

On June 3, 1988, appellant filed his Notice of Disagreement (NOD) with the decision of the Department of Veterans Affairs Regional Office regarding his disability rating for PTSD. Appellant, aware of the statutory restriction limiting this Court's review of BVA decisions to cases in which the NOD was filed on or after November 18, 1988, urges this Court to accept jurisdiction because he could have timely filed his NOD on or after November 18, 1988. *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 4105, 4122 [hereinafter the Act].

The agency of original jurisdiction decided appellant's claim on April 29, 1988. Appellant had until one year from that date to file his NOD. 38 U.S.C.A. § 4001(b)(1) (West Supp. 1989). Under these circumstances, appellant could have filed his NOD after November 18, 1988, which would have qualified his appeal for review in this Court. However, not knowing of the impending legislation that would later create the U.S. Court of Veterans Appeals, appellant filed his NOD on June 3, 1988, only 35 days after the decision.

On November 18, 1988, Congress enacted legislation creating the U.S. Court of Veterans Appeals. *See* Veterans' Judicial Review Act. In defining the jurisdiction of the Court, Congress provided that the Act "shall apply with respect to any case in which a notice of disagreement is filed . . . *on or after the date of the enactment of this Act* [November 18, 1988]." *Id.* at § 402 (emphasis added). Appellant asserts that it would be contrary to the intent of Congress in creating this Court and thwart the administration of justice to dismiss his appeal on jurisdictional grounds.

In choosing the Court's jurisdictional limits, Congress, having previously enacted the one-year period for filing a NOD, was aware that there would be those in appellant's position who had previously filed their NODs but who could have delayed and been within the Court's jurisdictional limits. In this context we note that this Court has previously held that its jurisdictional limits are not subject to equitable or flexible extensions. *Skinner v. Derwinski*, U.S. Vet. App. No. 89-150, slip op. at 2-3 (Jan. 29, 1990). "[C]ourts may not in any case, even in the interest of justice, extend their jurisdiction where none exits." *Id.* citing *Christianson v. Colt Industries Operating Co.*, 486 U.S. 800, 818 (1988). Accordingly, we hold the statutory language of the Act creates an inflexible barrier to the Court's jurisdiction to which neither the Constitution nor precedent allow exception, including a NOD, which as it turns out, if delayed, would have vested the Court with jurisdiction.

Accordingly, the appeal is dismissed for lack of jurisdiction.

Note: Pursuant to 38 U.S.C.A. § 4067(d)(2)
(West Supp. 1990) this decision will become the
decision of the Court thirty days from the date hereof.

U.S. COURT OF VETERANS APPEALS
FILED
JUL 2 1990

UNITED STATES COURT OF VETERANS APPEALS

No. 90-85

IN RE:
A MOTION FOR A STANDING ORDER

On Motion For A Standing Order

(Argued May 8, 1990 Decided July 2, 1990)

David Frohlich, with whom *Daniel A. Rezneck*, were on the brief as amicus curiae.

Jeffrey C. Corzatt and *David W. Engle*, with *Raoul L. Carroll*, General Counsel, and *Andrew J. Mullen*, Acting Assistant General Counsel, for the Secretary of Veterans Affairs.

Before NEBEKER, *Chief Judge*, KRAMER and FARLEY, *Associate Judges*.

KRAMER, *Associate Judge*:

Summary of Decision

This is a rule-making matter, undertaken at the behest of the Secretary of Veterans Affairs (Secretary), pursuant to the Court's authority to adopt rules of practice and procedure under 38 U.S.C.A. § 4064(a) (West Supp. 1990). The Secretary requests that the Court adopt a rule by a standing order excepting him from the proscriptions of two privacy laws. Those laws prohibit him from filing with the Court relevant records from a veteran's case file, thus frustrating the right of appeal conferred by the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (Act).

The Court concludes that the Privacy Act, 5 U.S.C. § 552a (1982), and the veterans' confidentiality provision contained in 38 U.S.C. § 3301 (1982), apply to proceedings before the Court. The Court further concludes that the motion for a standing order, to obviate the need to obtain written consent to the disclosure of records, is granted and that the Secretary shall transmit, without further order of the Court, unless otherwise ordered, all records and other materials that are subject to the protection of 5 U.S.C. § 552a and 38 U.S.C. § 3301, and which are required to be transmitted pursuant to Interim General Rules 3(d), 10, or 11, or which are required in an Interim General Rule 21 proceeding or for resolution of an issue involving the jurisdiction of the Court. Finally, the Court has decided, that with respect to disclosure of records containing certain sensitive information subject to the special protection of 38 U.S.C. § 4132 (1982), a subject which was not addressed in the Secretary's motion, no action will be taken at this time.

Background

On November 18, 1988, Congress passed the Act. Title III thereof established the United States Court of Veterans Appeals, a new Article I court of record. *See id.* §§ 301-303, 102 Stat. at 4113-22. The Act provided that the Court "shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals", 38 U.S.C.A. § 4052 (West Supp. 1990), stipulating that the Court's review "shall be on the record of proceedings before the . . . [Secretary] and the Board." *Id.* It further required that "all decisions of the Court . . . and all [records] . . . shall be public . . . open to . . . inspection", but that "[t]he Court may make any provision which is necessary to prevent the disclosure of confidential information including a provision that any such . . . information be placed under seal to be opened only as directed by the Court." 38 U.S.C.A. § 4068 (West Supp. 1990).

With the enactment of these provisions, conflict has developed between the Congress' obvious desire that the Court review the record utilized by the Board of Veterans' Appeals (BVA) in deciding cases and several statutory provisions that generally prohibit the Secretary from disclosing records that concern a particular veteran. *See* 5 U.S.C. § 552a(b); 38 U.S.C. § 3301(a). As a consequence, the Secretary notified the Court that, lacking written consent in many pending proceedings, he was unable to comply with provisions in the Court's Interim General Rules which required him to transmit a copy of the BVA decision and designate and transmit the record on appeal or otherwise transmit records required by the Court. *See* COVA R. 3(d), 10, 11, and 21 (Interim).

To resolve this impasse, the Secretary filed with the Court a Motion for Entry of Standing Order for Disclosure of Information by the Secretary of Veterans Affairs to the Court of Veterans Appeals (Motion) and a supporting memorandum (Secretary's Memorandum). The Motion requested that the Court issue a standing order that would require the Secretary to transmit necessary records to the Court. To ensure full exploration of the issues involved, the Court subsequently entered an order appointing and directing an amicus:

> to file a memorandum (1) responding to the aforesaid motion; (2) addressing the application of 38 U.S.C. § 4132 to pleadings and submissions of Department records to the Court in appeals and other proceedings; (3) addressing the advisability of notifying prospective appellants that the filing of a Notice of Appeal will be deemed a consent to disclosure by the Secretary of the Department to the Court of records otherwise protected by any applicable nondisclosure statute; and (4) addressing how 38 U.S.C. § 4068(b)(1) and Rule 11(c)(2) of the Interim General Rules of the Court should be used with respect to records protected under § 4132.

In re: A Motion for a Standing Order, U.S. Vet. App. No. 90-85 (order appointing amicus curiae, Feb. 16, 1990).

The Secretary declined to respond to the brief filed by the amicus, relying on his Motion and the Secretary's Memorandum. Interested veterans organizations and state agencies were invited to file their own memoranda, also as amici curiae, and several responded.

Analysis

I. Applicability of 5 U.S.C. § 552a and 38 U.S.C. § 3301 to Veterans' Records Required by the Court

In creating the Court, Congress provided for a process which can only operate if the Secretary can freely transmit to the Court all relevant records. The Act was enacted later than the statutes which the Secretary has invoked as the basis for his inability to disclose these records and contains its own measures for protecting confidentiality when necessary.

See 38 U.S.C.A. § 4068(b)(1) (authorizing measures to prevent disclosure of confidential information); *Id.* § 4069(a) (West Supp. 1990) (authorizing exceptions to requirement of publication). The Court's Interim General Rules recognize these protections. ("The court may make appropriate provisions to prevent disclosure of confidential information . . . . ") COVA R. 11(c)(2) (Interim). It is a long recognized rule of statutory construction that where there are conflicting provisions, the most recent "will control as it is the later expression of the legislature." 2A N. Singer, *Statutes and Statutory Construction* 51.02 (4th ed. 1984). Thus, a strong argument can be made that the Court's process is not constrained by the prohibitions of the Privacy Act and the confidentiality provision.

However, there is another canon of construction which counsels that: "Whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter . . . [s]tatutes for the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible." *Id.*; *see International Union of Elec., Radio & Mach. Workers v. NLRB*, 289 F.2d 757, 761 (D.C. Cir. 1960). The Court believes that the preferable approach is to give effect to each of the relevant statutory provisions if possible. In the situation at hand, a harmonious reading of all relevant statutes together with the implementation of a procedure which recognizes such a reading is possible. The Court therefore concludes that the Privacy Act, 5 U.S.C. § 552a, applicable to agency disclosure in general, and 38 U.S.C. § 3301, the confidentiality provision specifically applicable to disclosure of veterans' records, apply to disclosure made to the Court by the Secretary.

II. Standing Order to Comply with 5 U.S.C. § 552a and 38 U.S.C. § 3301

The Privacy Act, 5 U.S.C. § 552a, applicable to agencies in general, and 38 U.S.C. § 3301, the confidentiality provision specifically applicable to all veterans' records, control disclosure by the Secretary to the Court (except where 38 U.S.C. § 4132 applies, which was not a subject addressed in the Motion and involves the disclosure of records concerning drugs, alcohol, human immunodeficiency virus, or sickle cell anemia). Section 552a(b) prohibits "agency" disclosure of "any record which is contained in a system of records" except "pursuant to . . . written request . . . or with the prior written consent of [the veteran]" unless otherwise provided. Without doubt, the Department is an "agency" for purposes of the Privacy Act, *see* 5 U.S.C. § 552a(a)(1); 5 U.S.C. § 552(f) (formerly designated Section 552(e)), and appeal records prior to their transmission from the Department to the Court are contained in "a system of records". *See id.* § 552a(a)(5); Privacy Act Issuance, 1987 Comp., Volume V. pp. 774-75, 795-96, 808-12; 52 Fed. Reg. 4078 (Feb. 9, 1987); Secretary's Memorandum at 6. Section 3301 makes all materials in a veteran's claims file "confidential and privileged" prohibiting "disclosure . . . except as provided." Although several § 3301 exceptions standing alone might permit transmission of records from the Secretary to the Court, these sections must be read in conjunction with the Privacy Act, which itself contains its own exceptions. Section 3301(j), as it applies to disclosures to the Court, states that "any [such] disclosure . . . shall be made in accordance with the provisions of § 552a [Privacy Act] . . . ." Furthermore, the case law supports the notion that where "either law [could] apply", the "provisions more protective of . . . confidentiality" are the ones that govern. *Doe v. DiGenova*, 779 F.2d 74, 79 (D.C. Cir. 1985) (quoting S. Rep. No. 892, 94th Cong., 2d Sess. 11, *reprinted* in 1976 U.S. Code Cong. & Admin. News 1299, 1308); *see Doe v. Stephens*, 851 F.2d 1457, 1460-61 (D.C. Cir. 1988); *Heights Community Congress v. Veterans Admin.*, 732 F.2d 526, 531 (6th Cir.), *cert. denied*, 469 U.S. 1034 (1984). *But cf. Fitch v. Veterans Admin.*, 597 F.2d 1152, 1154-55 (8th Cir. 1979) (analyzing Section 3301 exceptions without reference to Privacy Act).

Section 3301(b)(2) provides an exception to nondisclosure "[w]hen required by process of a United States court to be produced in any . . . proceeding therein pending." While the Privacy Act also provides an exception based on judicial action, it permits only those disclosures made "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11).

Arguably, a requirement of a court "order" is narrower, and therefore more protective of confidentiality, than is a requirement of mere judicial "process," and the District of Columbia Circuit has so held. *DiGenova*, 779 F.2d at 83-84 (basing holding on analysis of similar language in Fair Credit Reporting Act and similar statutes, and on purposes of Privacy Act); *see Stephens*, 851 F.2d at 1462.

Other courts have at least implicitly agreed, holding that a grand jury subpoena signed by the clerk of the court -- which presumably would qualify as judicial "process," *see*

Brown v. United States, 359 U.S. 41, 49 (1959), *overruled on other grounds, Harris v. United States*, 382 U.S. 162 (1965) -- is not an "order of a court." *See In re Subpoena Duces Tecum to Testify Before the Grand Jury Directed to the Custodian of Records of TRW with Regard to Gren*, 633 F.2d 825, 827 (9th Cir. 1980) (holding grand jury subpoena not "order of court" for purposes of Fair Credit Reporting Act) (*In re Gren*).

Because a requirement for an "order of a court" is more protective of confidentiality than is a requirement of judicial "process", we conclude that the court "order" requirement of the Privacy Act displaces the "process" requirement of Section 3301. *See DiGenova*, 779 F.2d at 79, 85.

As one court has noted, "[t]here is nothing in the legislative history of the Privacy Act . . . to suggest what Congress intended by the term ['order of a court']". *Bruce v. United States*, 621 F.2d 914, 916 (8th Cir. 1980). Furthermore, as noted above, considerable litigation has taken place over the meaning of the term in the context of 5 U.S.C. § 552a(b)(11), and similar statutory provisions -- principally over the issue of whether a grand jury subpoena is such an "order". Those courts that have held that a grand jury subpoena is not a court order have supported their holdings on various grounds. *See DiGenova*, 779 F.2d at 80, 84; *In re Gren*, 633 F.2d at 828; *In re Application to Quash Grand Jury Subpoena*, 526 F. Supp. 1253, 1255 (D. Md. 1981); *In re Grand Jury Subpoena Duces Tecum Concerning Credit Bureau, Inc.*, 498 F. Supp. 1174, 1176 (N.D. Ga. 1980); *In re Application of Credit Information Corp. to Quash a Grand Jury Subpoena for the Prod. of Credit Records*, 457 F. Supp. 969, 972 (S.D.N.Y. 1978); *Stiles v. Atlanta Gas Light Co.*, 453 F. Supp. 798, 800 (N.D. Ga. 1978).

Under the terms of its *per curiam* order issued February 16, 1990, this Court established that its deliberations concerning any possible standing order to the Secretary to transmit records on appeal would be with the benefit of memoranda and oral argument. *See In re: A Motion for a Standing Order*, U.S. Vet. App. No. 90-85 (order appointing amicus curiae, Feb. 16, 1990). Based on the existence of such memoranda and oral argument and our consideration of them, we believe there would be significant differences between a standing order issued by the Court and a grand jury subpoena.

Unlike a subpoena, a standing order issued by the Court would not be issued *pro forma*. It would be more protective of privacy interests than a grand jury subpoena. It would receive upper-level evaluation. It would constitute a specific directive to the Secretary. And while it would not be a specific adjudication in each separate case, it would be a specific judicial determination for a specific type of situation wherein: the disclosing agency would be the same; the nature of the disclosed records would be the same; the manner of disclosure would be the same; the necessity to disposition would be the same; and the initiation of every proceeding by a veteran (or those deriving benefits from the status of a veteran) would be the same. Finally, every appellant or petitioner would have the opportunity to request the Court to grant specific privacy-protective measures. *See* 38 U.S.C.A. § 4068(b)(1); *Id.* § 4069(a); COVA R. 11(c)(2) (Interim).

We conclude that a standing order issued by the Court would be an "order of a court" under 5 U.S.C. § 552a(b)(11).

Even if a standing order issued by the Court would be an "order of a court," it must also be the order of a "court of competent jurisdiction". 5 U.S.C. § 552a(b)(11). A court of competent jurisdiction is a court "having power and authority of law at the time of acting to do the particular act." *Ex parte Davis*, 66 Okla. Crim. 271, 91 P.2d 799, 807 (Crim. App. 1939); *see DCA Food Indus. v. Hawthorn Mellody, Inc.*, 470 F. Supp. 574, 582 (S.D.N.Y. 1979); *Albright v. Nelson*, 87 F. Supp. 737, 740 (D. Minn. 1949); *Lubbock Oil Ref. Co. v. Bourn*, 96 S.W.2d 569, 571 (Tex. Civ. App. 1936).

Congress created the Court by statutory provision declaring that the Court was "established, under Article I of the Constitution of the United States", as "a court of record". 38 U.S.C.A. § 4051. The Court was given "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals", *id.* § 4052(a), with the "power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." *Id.* Such review is to be "on the record of proceedings before the [Secretary] and the Board", *id.* § 4052(b), and the Court, which may not review the Secretary's schedule of ratings for disabilities, is to limit its review of the Board's decision to the scope of review dictated by § 4061. 38 U.S.C.A. § 4052(b). Finally, although "all decisions of the Court . . . and all [records] . . . shall be public . . . open to . . . inspection", *id.* § 4068(a), "[t]he Court may make any provision which is necessary to prevent the disclosure of confidential information including a provision that any such . . . information be placed under seal to be opened only as directed by the Court." *Id.* § 4068(b). It follows from the Congressional grant of jurisdiction that the Court has jurisdiction to do that which is necessary in order for it to review a decision of the Board on the record of the proceedings before that Board. Such a review cannot be accomplished if the Secretary cannot or will not designate and transmit the relevant portions of that record.

The grant of jurisdiction to the Court therefore must include jurisdiction to order the Secretary to designate and transmit records required for case disposition. *Cf. Erspamer v. Derwinski*, U.S. Vet. App. No. 89-14, slip op. at 8-9 (Feb. 23, 1990) (rejecting contention that the Court lacked All Writs Act jurisdiction). It is immaterial whether one finds this jurisdiction to have been granted explicitly in the language of § 4061(a), which provides that the Court may "decide all relevant questions of law [and] interpret constitutional, statutory, and regulatory provisions", 38 U.S.C.A. § 4061(a) (West Supp. 1990), or whether it is seen as implicit in the basic jurisdictional grant of power to review the decisions of the Board, for in either case the Court cannot perform that core function for which it was established unless it is viewed as possessing such jurisdiction.

We conclude that the Court is a "court of competent jurisdiction" under 5 U.S.C. § 552a(b)(11).

Upon consideration of the Motion, after the benefits of memoranda and oral argument, and having concluded that 5 U.S.C. § 552a and 38 U.S.C. § 3301 apply to the transmission of veterans' records by the Secretary to the Court, and that a standing order issued by the Court would be an "order of a court of competent jurisdiction" under 5 U.S.C. § 552a(b)(11), we believe that the Motion should be granted.

The Motion does not address the disclosure of records concerning drugs, alcohol, human immunodeficiency virus, or sickle cell anemia which are given special protection under 38 U.S.C. § 4132. Although this subject was thoroughly addressed in both the Memorandum of Amicus Curiae and oral argument, the Court believes that no immediate action need be taken by the Court. Future action, however, may be taken as required.

Conclusion

In consideration of the foregoing, the Court now issues the following order.

ORDER

In consideration of the foregoing opinion, it is hereby ORDERED that:

1. The Motion of the Secretary is granted.

2. The Secretary of Veterans Affairs shall, in all future proceedings before the Court, transmit without further order of the Court, unless otherwise ordered, all records and other materials that are not subject to the protection of 38 U.S.C. § 4132 and which are required to be transmitted pursuant to COVA R. 3(d), 10 and 11 (Interim) or which are required in a COVA R. 21 (Interim) proceeding or for resolution of an issue involving the jurisdiction of the Court.

PER CURIAM

Special Appreciation

The Court is indebted to Mr. Daniel A. Rezneck of the law firm of Arnold and Porter, amicus curiae, and Mr. David Frohlich, also of Arnold and Porter, of counsel, who prepared the Memorandum of Amicus Curiae and presented oral argument. Their superb analysis of the issues involved is of tremendous value to the Court and deeply appreciated. The Court also expresses its thanks to counsel for the Secretary and to the Disabled American Veterans, American Veterans Committee, State of New Jersey and Commonwealth of Virginia for their significant contributions.

United States
Court of Veterans Appeals
Suite 400
1625 K Street, N.W.
Washington, D.C. 20006

J.S. COURT OF VETERANS APPEALS
FILED

JUL 3 1990

July 3, 1990

MEMORANDUM

FROM: Robert F. Comeau, Executive Officer
and Clerk of the Court

RE: No. 90-85 - In Re: A Motion For A Standing Order

Attached is a per curiam order of the Court that consists of amendments to this Court's opinion in the above-referenced case released on July 2, 1990.

UNITED STATES COURT OF VETERANS APPEALS

No. 90-85

In Re:

A Motion For A Standing Order

U.S. COURT OF VETERANS APPEALS
FILED
JUL 3 1990

On Motion For A Standing Order

Before: Nebeker, Chief Judge, and Kramer and Farley, Associate Judges.

O R D E R

It is ORDERED, sua sponte, that this Court's opinion entered on July 2, 1990, is hereby amended to reflect the following:

1. On page 1, in the caption section listing counsel for the Department of Veterans Affairs "*David W. Engle*" has been changed to "*David W. Engel*".

2. On page 1 at the third line under Summary of Decision, "38 U.S.C.A. 4064(a) (West Supp. 1990)" has been changed to "38 U.S.C.A. § 4064(a) (West Supp. 1990)."

3. On page 2 at line 4, "§ 5 U.S.C. 552a" has been changed to 5 U.S.C. § 552a".

PER CURIAM.

Copies to:

Daniel A. Rezneck
Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Honorable Edward J. Derwinski
Secretary of Veterans Affairs
c/o General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

U.S. COURT OF VETERANS APPEALS
FILED

MAY 29 1990

Clerk

Note: Pursuant to 38 U.S.C.A. § 4067(d)(2) (West Supp. 1990) this decision will become the decision of the Court thirty days from the date hereof.

UNITED STATES COURT OF VETERANS APPEALS

No. 89-11

BERNARD J. ROGOZINSKI, APPELLANT

V.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appellee's Motion for the Court to Resolve the Parties Differences in Constructing the Record on Appeal

(Submitted May 9, 1990 Decided May 29, 1990)

Robert P. Wenten for appellant.

Stephen A. Bergquist, with *Raoul L. Carroll*, General Counsel, and *Andrew J. Mullen*, Acting Assistant General Counsel, for appellee.

Before NEBEKER, *Chief Judge*, and KRAMER and FARLEY, *Associate Judges*.

FARLEY, *Associate Judge*: The parties to this appeal have been unable to resolve their differences with respect to the contents of the record on appeal before the Court. As a result, the Secretary of Veterans Affairs (Secretary) moved for an order requiring the appellant to show cause why certain medical records counter designated by appellant should not be excluded from the record on appeal. Treating appellee's motion as a request to resolve the matter pursuant to Interim General Rule 10, the appellant's counter designation is rejected.

The Interim General Rules of the Court contain the timetable and the mechanism for the construction of the record on appeal by the parties. Within 14 days after filing a timely Notice of Appeal with the Clerk, an appellant must file a statement of the issue or issues to be raised on appeal. COVA R. 5A (Interim). Interim General Rule 10 then requires that within 30 days of the appellant's filing of a statement of the issue or issues, the Secretary shall designate or list all of the material in the appellant's case file before the Board of Veterans' Appeals (BVA) deemed relevant to the issues on appeal. The appellant then has 21 days within which either to counter designate any additional material deemed relevant to the appeal or to express satisfaction with the Secretary's designation. Where the parties are unable to agree as to the content of the record on appeal, "the Court, on motion of a party or on its own motion, shall resolve the matter." COVA R. 10 (Interim).

In the case at hand, the Secretary filed a designation of the record on appeal with the Clerk on January 26, 1990. On February 20, 1990, appellant filed a "Designation of Record" (under Interim General Rule 10 this was the appellant's counter designation of the record on appeal.) In the counter designation, the appellant listed the "[m]edical records of Duane R. Anderson, M.D. 11/7/69 through 6/4/88" [hereinafter the Dr. Anderson records] as being relevant to his appeal; copies of the Dr. Anderson records were attached to the counter designation. On March 16, 1990, the Secretary filed a motion with the Clerk requesting an order requiring the appellant to show cause why the Dr. Anderson records submitted with the appellant's counter designation should not be excluded from the record on appeal.

On April 19, 1990, the Court issued an order to both parties directing them to answer specific questions with respect to the appellant's counter designation and the proceedings before the BVA. In response, both parties agreed that the Dr. Anderson records had not been proffered to the BVA at the time it rendered its decision which led to this appeal. The appellant admits that the Dr. Anderson records were not before the BVA because they were lost at that time. *See* Appellant's Response to April 19, 1990, Order. Recently discovered, the Dr. Anderson records are now being offered by the appellant to the Court, although the appellant concedes that they "provide no new and vastly different information" and that "they are cummulative [sic] and supportive of the information provided to the Board." *Id.* The appellant argues, however, that during the BVA hearing he made reference to the existence of the medical records of Duane R.

Anderson, M.D., and that, since he "foreshadowed" the existence of the medical records in question, they should be included in the record on appeal. After noting that the Dr. Anderson records were not part of the record before the BVA, the Secretary takes the view that the appellant has a choice; either continue to pursue this appeal without the Dr. Anderson records or seek to reopen his claim at the originating office and seek reconsideration on the basis of the Dr. Anderson records.

The Veterans' Judicial Review Act, 38 U.S.C.A. §§ 4051-4092 (West Supp. 1990), provides that this Court "shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." § 4052(a). However, such "[r]eview in the Court shall be on the record of proceedings before the Administrator and the Board." § 4052(b). This Court is thus precluded by statute from considering any material which was not contained in the "record of proceedings before the Administrator and the Board." Since the medical records of Duane R. Anderson, M.D., were not contained in the record before the BVA, we must reject the appellant's counter designation; the medical records of Duane R. Anderson, M.D., will not be included in the record on appeal.

It is so Ordered.

Note: Pursuant to 38 U.S.C.A. § 4067(d)(2) (West Supp. 1990), this decision will become the decision of the Court thirty days from the date hereof.

U.S. COURT OF VETERANS APPEALS
FILED
AUG 10 1990
OFFICE OF THE CLERK

UNITED STATES COURT OF VETERANS APPEALS

No. 89-75

CHARLES W. SWAN, APPELLANT,

v.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appellant's Motion for Order to Supplement the Record

(Submitted May 14, 1990 Decided August 10, 1990)

Rick Surratt (non-attorney practitioner), on the motion, for appellant.

Raoul L. Carroll, General Counsel, *Andrew J. Mullen*, then Acting Assistant General Counsel, and *Thomas A. McLaughlin*, on the response, for appellee.

Before NEBEKER, *Chief Judge*, and KRAMER and FARLEY, *Associate Judges*.

NEBEKER, *Chief Judge*: Appellant seeks an order directing the appellee (hereinafter "the Secretary") to supplement the record on appeal with the rulemaking record and all legislative facts associated with 38 C.F.R. § 4.16(c) (1989). Because he does not have standing to question the validity of § 4.16(c), appellant's motion for an order is denied.

On September 26, 1989, the Board of Veterans' Appeals (hereinafter "BVA") issued a decision affirming a rating decision that reduced appellant's schedular evaluation for service-connected schizophrenia, paranoid type, from 100 percent to 70 percent. On December 15, 1989, appellant filed a Notice of Appeal with the Court. He asserts that the BVA's decision is clearly erroneous. On February 11, 1990, the Secretary designated the record on appeal, and on February 22, 1990, appellant filed a statement that he was satisfied with the designated record. When appellant filed his brief with the Court on May 10, 1990, he attempted to raise an additional issue: whether 38 C.F.R. § 4.16(c) should be set aside as arbitrary, capricious and an abuse of discretion. On May 14, 1990, appellant filed a Motion for Order to Supplement the Record on Appeal with

> the rulemaking record and all legislative facts associated with § 4.16(c), circulars, manuals, etc., which implement and comment on the policy promulgated in § 4.16(c), and any available statistical data showing a comparison of allowance rates for total ratings for unemployable, mentally disabled veterans both before and after institution of the policy in question.

Appellant's Motion, at 3. Appellant asserts that the requested material is necessary to challenge the validity of § 4.16(c). Appellant's Motion, at 2.

Compensation for service-connected disability is based on ten grades of disability established by a schedule of ratings, which the Secretary is directed to adopt and apply. 38 U.S.C.A. § 355 (West Supp. 1990). Ratings are based on the average impairment of a veteran's occupational earning capacity. *Id.* Hence, a veteran assigned a schedular rating of 100 percent is deemed totally disabled. It is the policy of the Department of Veterans Affairs that veterans be rated totally disabled where service-connected disabilities prevent them from securing "a substantially gainful occupation." 38 C.F.R. § 4.16(b) (1989).

To this end, § 4.16(a) and § 4.16(c) provide total disability compensation where a person who fails to meet the schedular rating percentage is, nevertheless, unable to secure "a substantially gainful occupation." Section 4.16(a) provides:

> Total disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities: *Provided That,* if there is only one such disability, this disability shall be ratable at 60 percent or more, and that, if there are two or more disabilities, there shall be at least one disability ratable at 40 percent or more, and sufficient additional disability to bring the combined rating to 70 percent or more.

38 C.F.R. § 4.16(a) (1989). Section 4.16(c) provides that § 4.16(a) shall not apply

> in cases in which the only compensable service-connected disability is a mental disorder assigned a 70 percent evaluation, and such mental disorder precludes a veteran from securing or

> following a substantially gainful occupation. In such cases, the mental disorder shall be assigned a 100 percent schedular evaluation under the appropriate diagnostic code.

38 C.F.R. § 4.16(c). Therefore, § 4.16(c) produces the same effect for unemployable, mentally disabled veterans as § 4.16(a) does for other unemployable, disabled veterans, but by a different method: subsection (a) assigns total disability where the schedular rating is less than 100 percent; subsection (c) increases the schedular rating to 100 percent (hence, assigning total disability) where the schedular rating is at least 70 percent.

Appellant assumes the anomalous position of attacking the validity of § 4.16(c), which he also argues "should have been used" in adjudicating his claim. Appellant's Motion, at 2. Appellant argues that (i) § 4.16(c) has "inhibited" mentally disabled veterans in general from obtaining a total disability rating because it "sends the message" that total disability ratings under § 4.16(a) are barred for unemployability due to mental disability; (ii) mentally disabled veterans in general are "not made aware of . . . total schedular ratings for unemployability" under § 4.16(c); and (iii) adjudicators, as demonstrated by this case, have failed to apply § 4.16(c) when the veteran does not meet the 100 percent schedular criteria. Appellant's Brief, at 23.

Appellant requests that the Court set aside § 4.16(c) as arbitrary, capricious and an abuse of discretion, which is within the Court's scope of review. *See* 38 U.S.C.A. § 4061(a)(3)(A) (West Supp. 1990) (The Court's scope of review extends to setting aside "regulations issued or adopted by the [Secretary] . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). However, the scope of review is subject to the requirement of § 4066(a) that "[i]n order to obtain review by the Court of Veterans Appeals of a final [BVA] decision," the appellant must be a "*person adversely affected* by [the BVA's] action." *See* 38 U.S.C.A. § 4066(a) (West Supp. 1990) (emphasis added).

The required showing of adverse effect parallels the Article III "case or controversy" requirement that a litigant have standing, which "is perhaps the most important of [the 'case or controversy'] doctrines." *Allen v. Wright*, 468 U.S. 737, 750 (1984). We previously have held that this Court, although an Article I court, will adhere to the Article III "case or controversy" limitation. *See Mokal v. Derwinski*, U.S. Vet. App. No. 89-23, slip op. at 2-

3 (Mar. 9, 1990). We conclude that appellants are required both by § 4066(a) and *Mokal* to have standing.

The doctrine of standing requires that a litigant have a "personal stake in the outcome of the controversy," *Baker v. Carr*, 369 U.S. 186, 204 (1962), the purpose of which is to insure that issues are "presented in an adversary context and . . . [are] capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 101 (1968). In order to establish standing, the litigant must show "personal injury fairly traceable to the . . . unlawful conduct and likely to be redressed by the requested relief." 468 U.S. at 751 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

Appellant's argument that mentally disabled veterans in general are "inhibited" by misconstruing § 4.16(c), by not being informed of its provisions, or by its not being properly applied does nothing to establish that the appellant himself was adversely affected or has a personal stake in setting aside the regulation. In fact, appellant does not argue that he was adversely affected by § 4.16(c), but that the BVA should have applied it in adjudicating his claim, an issue which he is free to raise on appeal without challenging the validity of the regulation. Indeed, it appears that § 4.16(c), far from harming the appellant, operates in his favor. Since appellant has not been adversely affected by § 4.16(c), he does not have standing to question its validity. The Motion to Supplement is denied and the appeal shall proceed without consideration of the validity of § 4.16(c).

U.S. COURT OF VETERANS APPEALS
FILED
AUG 17 1990
OFFICE OF THE CLERK

Note: Pursuant to 38 U.S.C.A. § 4067(d)(2) (West Supp. 1990) this decision will become the decision of the Court thirty days from the date hereof.

UNITED STATES COURT OF VETERANS APPEALS

No. 89-167

CLEDA V. FRANKEL, APPELLANT,

V.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Submitted May 9, 1990 Decided August 17, 1990)

Cleda V. Frankel, on the brief for appellant, *pro se*.

Raoul L. Carroll, General Counsel, *Andrew J. Mullen*, then Acting Assistant General Counsel, and *Craig M. Kabatchnick* were on the brief for appellee.

Before NEBEKER, *Chief Judge*, and KRAMER and FARLEY, *Associate Judges*.

NEBEKER, *Chief Judge*: Appellant, Cleda V. Frankel, applied for death pension benefits as the surviving spouse of the veteran David Frankel. The Board of Veterans' Appeals (BVA) denied appellant's claim, finding that she and the veteran were divorced prior to his death. On appeal, appellant argues that the civil divorce did not dissolve the religious marriage and that she is therefore entitled to death pension benefits as the spouse of a veteran. We disagree and affirm the decision of the BVA.

Although this appeal has been briefed, it would have been perhaps more appropriate, given the clarity of the relevant statute, for the Secretary to have moved for summary affirmance. In order to provide guidance to present and future litigants, we take this opportunity to announce the criteria which this Court will use in summarily ruling on decisions of the BVA in future cases.

Review of the present case discloses that there are no disputed material facts. The Frankels were married in a civil ceremony on March 13, 1949, in Oakland, Maryland. Later, on October 29, 1949, the couple married in a religious ceremony. On August 19, 1985, appellant was granted a decree totally dissolving the marriage in the Circuit Court of Rockingham County, Virginia, a court of competent jurisdiction. The veteran died on May 20, 1988.

The issue before the Court is the legal significance, if any, of the religious marriage ceremony in determining eligibility to death pension benefits as the surviving spouse of a veteran. The provisions of 38 U.S.C. § 103(c) (Supp. V 1987) are dispositive:

> In determining whether or not a person is or was the spouse of a veteran, their marriage shall be proven as valid for purposes of all laws administered by the [Department of Veterans Affairs] according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued.

Appellant's right to benefits, if any, accrued at the veteran's death in May 1988. At that time, she and the veteran were divorced. The BVA correctly determined appellant was ineligible for death pension benefits as the surviving spouse of a veteran. We hold as a matter of law that the religious ceremony is irrelevant to the benefits sought here.

As with most of the appellate courts in this country, we find it necessary to articulate, within the limits of our review and dispositional authority, when summary disposition is appropriate. To do so, it is first necessary to outline that authority.

The primary purpose for creating the U.S. Court of Veterans Appeals was to provide for judicial review of BVA decisions. The Court's enabling legislation provides, "The Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. . . . The court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter as appropriate." 38 U.S.C.A. § 4052 (West Supp. 1990). "The Court may hear cases by judges sitting alone or in panels," 38 U.S.C.A. § 4054(b) (West Supp. 1990), or en banc. 38 U.S.C.A. § 4067(d)(2) (West Supp. 1990).

The standard of review to be employed by the Court when reviewing BVA decisions is determined by whether the issues presented on appeal were questions of law or of fact. The Court's enabling legislation provides:

> In any action brought under this chapter, the Court of Veterans Appeals, to the extent necessary to its decision and when presented, shall--
>
> (1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the [Secretary];
>
> (2) compel action of the [Secretary] unlawfully withheld or unreasonably delayed;
>
> (3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusion, rules and regulations issued or adopted by the [Secretary], the Board of Veterans' Appeals, or the Chairman of the Board found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
>
> (D) without observance of procedure required by law; and
>
> (4) in the case of a finding of material fact made in reaching a decision in a case before the [Department of Veterans Affairs] with respect to benefits under law administered by the [Department of Veterans Affairs], hold unlawful and set aside such finding if the finding is clearly erroneous.

38 U.S.C.A. § 4061(a) (West Supp. 1990).

If, upon consideration of the record, the Court cannot say the factual findings of the BVA are "clearly erroneous," *see* 38 U.S.C.A. § 4061(a)(4); *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); *Danville Plywood Corp. v. United States*, 899 F.2d 3 (Fed. Cir. 1990); or that there is an error of law, the Court is obligated to affirm the BVA's decision. Due regard must be given by the Court to the rule of prejudicial error. 38 U.S.C.A. § 4061(b).

Whether a decision warrants an opinion of the Court or whether it should be summarily decided by order is, to a great extent, a function of its precedential value. The Court has surveyed the standards for summary disposition found in internal operating procedures and local rules for other federal appellate courts. We have chosen to adopt the following standard for summarily acting on BVA decisions appealed to the Court: If, after due consideration, the Court determines that the case on appeal is of relative simplicity and

1. does not establish a new rule of law;
2. does not alter, modify, criticize, or clarify an existing rule of law;
3. does not apply an established rule of law to a novel fact situation;
4. does not constitute the only recent, binding precedent on a particular point of law within the power of the Court to decide;
5. does not involve a legal issue of continuing public interest; and
6. the outcome is not reasonably debatable,

the decision of the BVA may be affirmed or reversed on motion for summary disposition by either party, or on the Court's own initiative, by an order and judgment without opinion.

By statute, this Court may sit by single judge, in panels of three or en banc, 38 U.S.C.A. §§ 4054(b), 4067(d)(2). Single judges will consider and decide cases identified for summary consideration and decision. Under the internal operating procedures of the Court, there will be internal circulation of a proposed decision with time and opportunity for non-sitting judges to respond.

In anticipation of a heavy case load the Court has implemented a case management system with a central legal staff assigned to evaluate the cases as soon as issues are identified and relative simplicity or complexity can be determined. This process, sometimes entailing a personal or telephone conference between a staff attorney and the parties, will make it possible to treat a considerable number of cases without full briefing and oral argument. To this end, the initial staff evaluation and recommendation can lead to expedited disposition on truncated memoranda or motions for summary disposition and responses in lieu of briefs.

It is now obvious that this decision does establish a new rule of law (albeit one consistent with 38 U.S.C. § 103(c)) that a religious marriage ceremony does not survive a civil divorce for purposes of entitlement to benefits under laws administered by the Department of Veterans Affairs. In the future, a case presenting the same issue may be summarily decided under the criteria announced today. However, it should not be concluded from this decision that all issues initially decided by the Court require an opinion. For example, appeals involving decisions of the BVA which are consistent with general federal law, or cases presenting purely questions of law regarding sufficiency of the evidence to support denial of benefits or the application of the clearly erroneous standard, *see* 38 U.S.C.A. § 4052(a)(4), are subject to summary disposition without antecedent precedent in our opinions. Accordingly, this Court will, on a case by case basis, decide summarily those relatively simple cases where the outcome is not reasonably debatable.

United States
Court of Veterans Appeals

June 13, 1990

Chambers of
Chief Judge Frank Q. Nebeker

The Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515-6501

Dear Mr. Speaker:

Enclosed is a draft bill "to provide technical corrections to the Veterans' Judicial Review Act" which was enacted as Public Law 100-687 on November 18, 1988. We request that this bill be referred to the appropriate committee for prompt consideration and enactment.

This Court's enabling legislation, the Veterans' Judicial Review Act, contains a provision at section 4067(b) of title 38 (section 301 of the Act) which requires the Court to include in its decision a statement of its conclusions of law and determinations as to factual matters. This requirement should be deleted. It was derived, as were many procedural aspects of the Act, from the United States Tax Court's enabling legislation, at section 7459(b) of title 26. While appropriate for a court which conducts proceedings similar to nonjury trials in the district courts, such a requirement does not belong in the charter of an appellate court whose review is limited to the record generated below. Indeed, it is noteworthy that a similar requirement is appropriately imposed on the Board of Veterans' Appeals by section 4004(d) of title 38 so that our Court can limit its review in accordance with sections 4052 and 4061 of title 38.

Section 4067(d) of title 38 directs that decisions of the Court shall not become effective until the expiration of a 30-day waiting period, during which the Court can decide to review the decision. In our view, the interests of justice will be better served if this provision is deleted. Its effect is to delay unnecessarily the disposition of cases and to hinder the efficient administration of justice with no offsetting value. No other federal appellate court is required to delay the effective date of a decision in this manner. Reviews, rehearings, and the en banc consideration of cases are among an appellate court's inherent powers; procedures for them are routinely covered by court rules.

Section 4067(d) was derived, as well, from the United States Tax Court's enabling legislation at section 7460 of title 26. Its purpose was to assure the development of a uniform body of precedents in a trial court which sat in several geographically-separated single-judge divisions. While such an approach had merit for the 65-member veterans court envisioned by H.R. 5288, 100th Cong., 2d Sess. (1988), it is unnecessary for this 7-member appellate court which is removed from agency factual determinations.

An additional disadvantage of section 4067(d) is that it could generate unnecessary litigation. A decision announced by any other federal appellate court immediately becomes binding precedent on all courts and administrative bodies subject to its jurisdiction. Section 4067(d) creates a unique 30-day window in which the Board of Veterans' Appeals, knowing of the Court's decision, is not obligated to follow it. Even with a good faith effort by the Board to apply the Court's decision as precedent during the 30-day window, it seems inevitable that this anomaly will inadvertently become the source of unnecessary appeals and requests to the Court for extraordinary relief.

Section 2 of our draft bill would eliminate the problems described above by repealing sections 4067(b) and (d) of title 38, and by making conforming modifications within section 4067.

Section 3 of our draft bill would authorize an annual judicial conference of the Court. Such conferences, formally authorized in Federal courts of appeal since 1939 and in the Court of International Trade since 1986, provide a valuable vehicle for regular discussions between bench and bar. While our Court is part of the Federal Circuit, we note that the Federal Circuit's judicial conference is already extremely large without the addition of our practitioners. Our conference would focus on the specialty of veterans law and would take into particular account the needs of the large number of nonattorney representatives who practice before our Court and who would not be a part of the Federal Circuit's judicial conference.

Section 4 of our draft bill would make several clerical changes to insert the current titles of officials and organizations and to eliminate a numbering duplication. In addition, it changes the wording of a housekeeping provision at section 4068(b)(2) of title 38 to duplicate more precisely a similar provision in the Tax Court's enabling Act. Although the issue is unlikely to arise often, that change restores to the Court its proper control over exhibits.

Sincerely yours,

Frank Q. Nebeker

Frank Q. Nebeker
Chief Judge

Enclosure

101st Congress
2d Session

A BILL

To make technical amendments to the Veterans' Judicial Review Act

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,

Section 1. SHORT TITLE.

This act may be cited as the "Veterans' Judicial Review Amendments of 1990".

Section 2. AMENDMENTS TO SECTION 4067 OF TITLE 38, UNITED STATES CODE.

(a) Section 4067(b) of Title 38, United States Code, is repealed.

(b) Section 4067(c) is renumbered 4067(b)

(c) Section 4067(d) is repealed.

(d) Section 4067(a) is amended by deleting the words "except as provided in subsection (d) of this section".

(e) Section 4067(e) is renumbered 4067(c).

Section 3. JUDICIAL CONFERENCE.

Subchapter III of Chapter 72 of Title 38, United States Code, is amended by adding at the end the following new section:

"§ 4086. Judicial Conference of the Court of Veterans Appeals

"The Chief Judge of the Court of Veterans Appeals is authorized to summon annually the judges of the Court to a judicial conference, at a time and place that he designates, for the purpose of considering the business of the Court and advising means of improving the administration of justice within the Court's jurisdiction. The Court shall provide by its rules for representation and active participation at such conference by persons admitted to practice before the Court and by other persons active in the legal profession.

SECTION 4. CLERICAL AMENDMENTS.

Title 38 is amended--

(a) by striking out "Administrator" wherever it appears and inserting in lieu thereof "Secretary" in the following sections--

(1) subsections (a) and (b) of section 4052;

(2) subsections (a)(1), (a)(2), (a)(3), (c) and (d) of section 4061;

(3) subsection (a) of section 4063;

(4) subsections (b)(1) and (b)(2)(C) of section 4091;

(5) subsection (b)(1) of section 4092.

(b) by striking out "Veterans' Administration" and inserting in lieu thereof "Department of Veterans Affairs" in the following sections--

(1) subsection (a)(4) of section 4061;

(2) subsection (a) of section 4063.

(c) by amending the second sentence in subsection (c) of section 4067 (as that subsection is redesignated by section 2(e) of this Act) to read as follows: "The Secretary shall preserve records so designated for not less than the period of time designated by the Archivist of the United States.".

(d) by striking out "shall" and inserting in lieu thereof "may, upon motion of the appellant or the Secretary," and by striking out "before" and inserting in lieu thereof "; or" in subsection (b)(2) of section 4068.

(e) by redesignating the second section 4054(d) thereof (authorizing judges of the Court to administer oaths) as section 4054(e).

SECTION-BY SECTION ANALYSIS

Section 2

Section 2 would amend section 4067 of title 38 by deleting the requirement that the Court of Veterans Appeals include in its decision a statement of its conclusions of law and determination as to factual matters, by deleting the provision which creates a 30-day waiting period before a decision of the Court becomes effective, and by making conforming changes to the remainder of the section.

Section 3

Section 3 would authorize an annual judicial conference of the Court of Veterans Appeals.

Section 4

Section 4 would amend various provisions of Chapter 72 of title 38 to substitute the current titles of officials and agencies, would modify the procedures in section 4068 for disposing of evidence after a decision of the Court becomes final, and would correct a numbering error in section 4054.

OPENING STATEMENT
VICE CHAIRMAN BOB McEWEN (OHIO)
SUBCOMMITTEE ON COMPENSATION, PENSION
AND INSURANCE
OPERATIONS OF THE BOARD AND THE U.S. COURT
OF VETERANS APPEALS
OCTOBER 4, 1990

AS SOMEONE WHO HAS LONG TAKEN AN INTEREST IN THE CLAIMS ADJUDICATION PROCESS, I AM GRATEFUL FOR TODAY'S OPPORTUNITY TO RECEIVE A FIRST-HAND ASSESSMENT OF THE BOARD OF VETERANS APPEALS AND THE U.S. COURT OF VETERANS APPEALS. THE PROCESS BY WHICH VETERANS' CLAIMS ARE SETTLED REPRESENTS A CORNERSTONE OF THE VETERANS BENEFIT SYSTEM, AND THAT CORNERSTONE APPEARS TO BE DETERIORATING.

AS MANY OF YOU KNOW, I HAVE OFTEN EXPRESSED MY FRUSTRATION WITH THE LEVEL OF SERVICE ACCORDED TO VETERANS WHO FILE CLAIMS FOR BENEFITS. TOO OFTEN, THESE CLAIMS TAKE TOO LONG TO SETTLE. WHILE SOME CLAIMS ARE ADJUDICATED IN A MATTER OF MONTHS, OTHERS CAN GO ON FOR YEARS. WE'VE HELD HEARINGS ON CLAIMS TIMELINESS AND QUALITY, AND WE'VE COVERED THE SUBJECT DURING BUDGET DISCUSSIONS. THE FRIGHTENING STATISTICS ON CLAIMS BACKLOGS WITHIN THE DEPARTMENT OF VETERANS AFFAIRS LEAD ONE TO FEAR SOME CLAIMS MAY NEVER BE DECIDED. THAT IS INEXCUSABLE.

IT MAY BE TIME TO ENACT A LAW TO REQUIRE THE DEPARTMENT OF VETERANS AFFAIRS (DVA) TO DO WHATEVER IS NEEDED TO SPEED UP THE PROCESSING OF VETERANS CLAIMS. I HAVE GROWN TIRED OF PLEADING WITH THE DVA TO MAKE

INTERNAL IMPROVEMENTS TO BECOME MORE RESPONSIVE TO VETERANS SEEKING VITALLY NEEDED SERVICES. CLEARLY, A STATUTORY APPROACH, WITH REASONABLE DEADLINES, SHOULD BE EXPLORED.

TODAY, I HAVE INTRODUCED THE VETERANS' CLAIMS ADMINISTRATIVE EQUITY ACT OF 1990 WITH THAT THOUGHT IN MIND. I HOPE THE MESSAGE IS CLEAR -- THAT IT IS TIME TO GET A HANDLE ON THE DELAYS AND BACKLOGS WHICH HAVE BOGGED DOWN VETERANS CLAIMS PROCESSING AND DENIED BENEFITS TO DESERVING VETERANS. THE VETERANS BENEFITS ADMINISTRATION, FOR ALL ITS MANY HUNDREDS OF DEDICATED EMPLOYEES AND AUTOMATION, CONTINUES TO FALL SHORT OF THE EXPECTATIONS OF THIS COMMITTEE AND, MOST IMPORTANT, THE VETERANS IT WAS ESTABLISHED TO SERVE.

THROUGHOUT THE VETERAN POPULATION, IT MIGHT BE ASSUMED THAT THE LEVEL OF SERVICE TO VETERANS NOW YIELDED UNDER THE PRESENT SYSTEM IS THE TYPE OF SERVICE THAT IS INTENDED BY THE CONGRESS, AND THIS COMMITTEE. THAT ASSUMPTION IGNORES THE PRESENT REALITY, BECAUSE THE SYSTEM IS FALLING SHORT OF MY REASONABLE EXPECTATION AND, I SUSPECT, THOSE OF MANY OF MY COLLEAGUES.

WE NEED TO MANDATE VETERANS CLAIMS REFORM. MY LEGISLATION WOULD ESTABLISH STRICT TIMELINESS REQUIREMENTS ON THE VETERANS BENEFITS ADMINISTRATION. THE BILL IS NOT COMPLICATED. IT DIRECTS THAT AN

INITIAL CLAIM FOR BENEFITS MUST BE DECIDED IN 180 DAYS FROM THE DATE FILED. THAT IS NOT UNREASONABLE. FOR INITIAL CLAIMS THAT ARE DENIED AND FOR WHICH THE CLAIMANT FILES A NOTICE OF DISAGREEMENT, THE SECRETARY OF VETERANS AFFAIRS WOULD BE REQUIRED TO CERTIFY THE CASE TO THE BOARD OF VETERANS APPEALS WITHIN 180 DAYS.

THIS BILL HAS TEETH. IT WOULD PROVIDE FOR THE PAYING OF INTERIM BENEFITS TO CLAIMANTS IN CASES WHERE THE VBA COULD NOT MEET THE DEADLINES I JUST OUTLINED. HOWEVER THE CASE IS ULTIMATELY DECIDED, ANY INTERIM BENEFIT PAID TO A VETERAN WOULD NOT BE SUBJECT TO RECOVERY BY THE DEPARTMENT. THIS SMALL ACCOMMODATION BY THE GOVERNMENT CANNOT FULLY COMPENSATE FOR THE UNCERTAINTY AND HARDSHIP ACCOMPANYING THE VETERAN'S LONG WAIT FOR SERVICE.

I WOULD APPLY THE PROPOSED TIMELINESS STANDARDS TO ALL COMPENSATION, DEPENDENCY AND INDEMNITY COMPENSATION, AND PENSION CLAIMS. IN ADDITION, THIS LEGISLATION ADDRESSES THE PROBLEM -- NOT UNCOMMON -- IN WHICH A VETERAN HAS BEEN FOUND ELIGIBLE FOR VOCATIONAL REHABILITATION AND COUNSELING SERVICES AND IS NOT SERVED IN A REASONABLE TIME. IN THOSE CASES WHERE ELIGIBILITY FOR THESE SERVICES IS ESTABLISHED AND AN INTERVIEW WITH DEPARTMENT OFFICIALS IS DELAYED BEYOND 60 DAYS, THE SECRETARY SHALL ARRANGE FOR THIS ASSISTANCE THROUGH AN ACCREDITED AGENCY. THESE SERVICES ENABLE VETERANS TO REENTER THE WORKFORCE AS PRODUCTIVE CITIZENS, A PROCESS THAT SHOULD NOT BE

HAMPERED BY BUREAUCRACY.

THIS IS MY PROPOSAL. COPIES OF THE DRAFT BILL ARE AVAILABLE ON THE WITNESS TABLE. CLEARLY, IT IS LATE IN THE SESSION, AND IMMEDIATE ACTION IS UNLIKELY. HOWEVER, WHEN THIS COMMITTEE ASSEMBLES FOR THE 102ND CONGRESS, I LOOK FORWARD TO HOLDING HEARINGS ON THIS LEGISLATION AND MAKING MANDATED CLAIMS TIMELINESS A REALITY.

I BELIEVE THAT A BENEFIT OR SERVICE TO WHICH A VETERAN IS ENTITLED IS ERODED CONSIDERABLY WHEN IT IS NOT DELIVERED IN A REASONABLY TIMELY WAY. MY BILL DEFINES OBJECTIVES FOR TIMELINESS, IN THE INTEREST OF A LARGER GOAL: SERVING THE DESERVING VETERAN.

THE VETERANS CLAIM PROBLEM HAS NOT BEEN A CASE OF MISSED TARGETS, BECAUSE THERE HAVE BEEN NO MINIMUM SATISFACTORY STANDARDS FOR WHICH TO STRIVE. IT IS COMMON SENSE THAT WHEN YOU DON'T KNOW WHAT YOU'RE AIMING FOR, YOU'RE PROBABLY GOING TO MISS THE TARGET.

WITH THAT, I WISH TO YIELD TO THE CHAIRMAN SO WE MIGHT PROCEED TO OUR DISTINGUISHED WITNESSES.

# # #

DEPARTMENT OF VETERANS AFFAIRS
Statement of Roger K. Bauer
Vice Chairman, Board of Veterans Appeals
To the Subcommittee on Compensation,
Pension and Insurance
House Committee on Veterans' Affairs

October 4, 1990

Mr. Chairman, I am pleased to be here today to report on the current performance of the Board of Veterans Appeals. Ordinarily, Kenneth E. Eaton, Chairman of the Board of Veterans Appeals would represent the Department at this hearing before your subcommittee. As you may be aware, Chairman Eaton is currently undergoing medical treatment that prevents his appearance at this time. I will concentrate my remarks on the timeliness of the appeals process, the quality of the appeals function, staffing needs at the BVA and the impact of judicial review on the Board's operations, as requested in your September 7, 1990 letter to Secretary Derwinski.

At our last appearance before this subcommittee on June 6, 1989, we provided an overview of the numerous changes that were then being made at the BVA in preparation for judicial review. The actions that we have taken over the past two years have provided a solid foundation for our future operations within a judicial review environment. Although judicial review has already affected many aspects of our BVA operations, we believe that we have not yet experienced its full impact, due to the limited number of actual decisions that have been handed down by the Court of Veterans Appeals as of this date. I will provide some additional details as to the current impact of judicial review on BVA operations later in these prepared remarks.

We indicated during our last oversight hearing before this subcommittee that we were experiencing a growth in the rate of new appeal receipts at the BVA. As a result of this increase in receipts, our backlog had risen to where we had over 19,000 active cases on our appellate docket, which for several years prior to that time had averaged between 13,000 and 15,000 active cases. We were very concerned that continuing heavy appeal receipts and a growing appellate backlog would impair our ability to render decisions on a timely basis. Our then current projections indicated that if the appeal receipt trend were to continue, BVA response time on appeals would rise to between 170 and 200 days by the end of this fiscal year. Even these projections proved to be conservative, and our actual response time had climbed to a level of 210 days by the close of fiscal year 1989.

This trend toward a rising response time was disturbing to both BVA management and VA management at the Departmental level. During the course of the VA's FY 1991 internal budget development process which took place during the summer of 1989, it was resolved that the number one BVA priority for FY 1990 and FY 1991 was to bring our response time under control. The Secretary's guidance on this issue was clear, and we therefore launched a response time reduction initiative at the outset of FY 1990 with the goal of reducing our response time to a level of 150 days or less by the conclusion of FY 1991.

At the outset of this initiative, we recognized that a fundamental requirement for improving the timeliness of our service delivery was the ability to decide a greater number of appeals than we expected to receive over the next two years. Productivity improvement was therefore the principal focal point of our initiative. Our projections indicated that, given an estimated receipts volume of 44,000 appeals per year, the production necessary to achieve our response time reduction goals would require us to increase our organizational productivity for FY 1990 and 1991 by approximately 15% in comparison to our FY 1989 level.

We regarded this initiative as a challenge that afforded us an opportunity to substantially improve one very important aspect of the basic service that we provide. We realized at the outset that a 15% productivity improvement is a significant increase that is unlikely to occur in the absence of some meaningful changes to the manner in which an organization conducts its operations. The approach we structured for this initiative was therefore developed with the understanding that our entire organization needed to be closely examined to pinpoint areas where our operations could be streamlined or improvements could be made in our efficiency. As individual productivity improvement measures were proposed, each was considered in relationship to the anticipated affect it might have upon the quality of the Board's services. While we recognized that there might conceivably be some tradeoffs between productivity gains and quality, we implemented changes only when we felt that a proposed revision would not affect the substantive quality, or the correctness, of our decision making processes.

One of our focal points for productivity gains was to increase the percentage of BVA professional staff time devoted to decision production activities. One of the most effective means of improving organizational efficiency is to concentrate the use of personnel resources on production as opposed to overhead activities. After reviewing our Professional Service operations, we concluded that our staff attorney positions provided the greatest opportunities for this type of productivity gain. The first measure that we instituted in this area was to minimize our use of senior staff attorneys as Acting Board Members. Our practice in the past was to designate a senior staff attorney as an Acting Board Member whenever there was a Board Member vacancy or temporary absence. Over the past year, however, we have exercised the authority of 38 U.S.C. §4002(a)(2)(A) permitting a decision to be signed by two instead of three Board Members when there is a Board Member vacancy or when one of the Members is temporarily absent or unable to serve. We instituted similar controls on what we call attorney time "special time," which consists of time devoted to internal BVA support activities other than decision production. By holding down the use of senior attorneys as Acting Board Members and by minimizing attorney "special time," we have been able to substantially increase the amount of staff attorney time available for decision production. All of our current Board Members have made substantial contributions toward the success of this initiative, as well. By holding down the use of senior staff attorneys as Acting Board Members, we have, by default, imposed a greater workload on the current Board Member staff. No additional staffing was provided to assist them with the added workload that has been involved during the course of this initiative, and there has been considerable extra effort and uncompensated time contributed by our Board Members. This group has risen to the challenge, and our overall success in reducing BVA response time is largely due to their efforts.

We have also been able to achieve productivity gains by encouraging brevity in writing the more routine and simple decisions. Decreased recitation of evidence in decisions is one example of where economies can be achieved in decision writing without impairing the substantive quality of the decisions themselves. In fact, it is often the case that a brief, concise decision can be qualitatively equal or superior to a more lengthy and detailed decision.

Automation is another area that we have turned to for productivity improvement, albeit productivity improvement of a longer term nature. We have incorporated bar coding technology into our case tracking and locator system over the six months, and we believe that this initiative will produce measurable productivity gains in several areas throughout the BVA. In addition to the obvious data entry labor savings involved in supporting a case tracking system, bar coding will greatly improve the accuracy of our tracking system, thus reducing case searching times and speeding up many of our administrative operations. We have also examined various automation options for our Professional Service operations, all of which focus on placing more automation tools directly in the hands of our Board Section personnel. Acquisition actions have been initiated that should allow us to begin testing the concept of Board Section automation by early next year. We believe that while immediate productivity gains may be minimal, there is considerable long term productivity potential inherent in this concept.

These actions and others taken over the past year have enabled us to make what we feel is a remarkable turnaround on our response time. Our response time, which had grown to over 230 days as of December 1989, is now down to around 145 days. Our FY 1990 decision volume of approximately 46,500 appeals is greater than any year since 1955. This achievement was made possible by the productivity improvements we were able to make over the past year. Where we had hoped to achieve a 15% productivity improvement, we actually achieved a gain of over 20%. We are very proud of this accomplishment because it translates into a very real improvement in one aspect of the services we provide all VA appellants. We believe that we will be able to continue building upon this accomplishment in the upcoming year, and, barring any unforeseen developments, we should be able to bring our response time down to 135 days or less by next year.

The timeliness and quality of the VA's appellate process have also been the subject of a recent review conducted by the U. S. General Accounting Office. At the request of Chairman Montgomery and Ranking Minority Member, Bob Stump, GAO began an evaluation of the VA appeals process in 1988, with particular emphasis on timeliness. GAO completed their evaluation and issued their formal report in May 1990. We found GAO's report on the whole to be a balanced assessment of the status of the VA appellate system with respect to processing timeliness. Their recommendations pertaining directly to the BVA were relatively minor, and we have already incorporated them into our operations. One recommendation, for example, advocated that the BVA should provide more regular feedback to the Veterans Benefits Administration (VBA) regarding field station appellate system processing time. This recommendation was implemented several months ago, and we now provide routine recurring reports to VBA in this area. The second major GAO recommendation directed to the BVA was concerned not so much with what we do, but with how we report it. This recommendation focused on BVA reporting practices for overall VA appellate system processing time. In descriptions of total VA system processing times, BVA practices had been to provide average processing times for each of the major steps of the appellate process, both in the field and at the BVA, and to summarize these into an overall average system processing time. One of GAO's criticisms was that this practice failed to account for the time spent in remand status for those cases that the BVA has remanded back to the originating field stations for additional development. We have already initiated changes to our tracking system that will enable us to prospectively capture the information necessary to accurately account for this time. In the interim, we already have sufficient data to develop reasonably accurate estimates of this time, and we have included a line item showing this new aspect of VA appellate system time in the processing time highlights included in Table 1 attached to this statement.

Table 1 also provides an overview of a variety of other BVA workload statistics in addition to appellate system processing time. Please note that the last column detailing various FY 1990 workload statistics contains actual data for only the first three quarters of the fiscal year. Actual end-of-year data for the full fiscal year are not yet available. One final workload issue that concerns us greatly is our ability to provide timely service on appellant requests for Travel Board hearings. The 1988 judicial review legislation contained provisions directing the BVA to expressly offer each appellant the opportunity to request a formal hearing in the field before a traveling panel of BVA Board Members. These provisions futhermore instructed that requested hearings would be scheduled on a first-come, first-served basis. There is some indication from information provided by some of the larger VBA field stations that they are receiving a growing number of Travel Board hearing requests and that a backlog of hearing requests may be developing. We are presently working with VBA to determine the magnitude of this backlog. We are limited in our ability to provide a standard Travel Board hearing in which three BVA Board Members would travel to a field to conduct hearing. We have 66 statutory Board Member positions, and these individuals are not able to simultaneously conduct hearings in field locations and perform their decision making responsibilities at the Board. If the volume of these Travel Board hearing requests grows, we will have to consider some changes to our traditional program in order to timely respond to Travel Board hearing requests.

BVA staffing as of the end of the fiscal year is at approximately 406 FTEE, which is equal to our overall average staffing level for all of FY 1990. The Department has strongly supported us in the staffing area this past year. Although resources were made available to support a staffing level considerably higher than our actual staffing, we have had a very high turnover in both our professional and administrative areas this past year. As of this date, approximately 40 out of a total of 150 BVA staff attorneys have less than one year of BVA experience. We have had a particularly difficult time maintaining our target staffing level in our administrative area. Recruiting and retaining qualified clerical employees has become a major problem. We are currently restructuring our administrative area in a manner that we believe will be more advantageous to the Board from a staffing perspective and will, hopefully, contribute to our overall productivity. This restructuring will provide better career ladder opportunities for virtually all of our administrative staff personnel, and it should make our administrative operations far less susceptible to workload bottlenecks. The staffing level that we will be operating under for FY 1991 will not be conclusively determined until the FY 1991 budget is resolved. However, the House version of the 1991 VA Departmental budget provides a staffing level of 427 FTEE for the BVA. We believe that this staffing level is sufficient for our expected workload of 44,000 to 45,000 appeals and that it would allow us to meet our timeliness objectives.

IMPACT OF JUDICIAL REVIEW

Appeal processing at the Board will necessarily become more oriented toward the technical legal aspects of the adjudication process as a result of the advent of judicial review. In the past, the Board has tended to concentrate on factual analysis, inasmuch as the average individual appellant is most interested in the end result of his or her appeal and the assessment of the factual situation. Appeals to the U.S. Court of Veterans Appeals (COVA), however, often hinge on procedure and other more technical matters. Court review will necessarily require increasing legal preciseness.

Since the judicial review legislation specifies that the BVA must provide "the reasons and bases" (38 U.S.C. § 4004(d)(1)) for the decision, there is a growing tendency toward frankness in decisions. You will begin to see more discussion as to the credibility of evidence and reasons why certain evidence will not be accorded as much weight as other evidence in the record.

A new addition to the BVA workload will be the BVA decisions resulting from cases which have been remanded to the Board for additional action mandated by COVA.

The recent judicial review legislation has redefined the use of the term "reconsideration" and has essentially enlarged its scope. The reconsideration, itself, is somewhat in the nature of a rehearing and is not solely limited to a review for error. Thus, reconsiderations ordered by the Chairman will permit the expanded section to consider the appeal not from the standpoint of obvious error but to the same extent as the original Board Section. An important aspect of this law is that, at the time the Chairman orders the reconsideration, the decision which is being reconsidered is in fact vacated and of no force and effect. Although the scope of review on reconsideration, once a motion has been granted, has been expanded, a reconsideration will remain an extraordinary remedy.

The defense of BVA decisions in COVA has required additional and substantial liaison with the Office of General Counsel. The activities are quite varied and numerous.

At the time that an appeal is filed with COVA, the BVA is notified by the Office of General Counsel. At this time the Board prepares a certified copy of its docket, gathers other related material and determines if the decision is subject to judicial review.

The BVA staff reviews records folders and BVA decisions for the General Counsel and prepares affidavits and declarations for signature by BVA employees. Written statements of BVA policy and procedure required in COVA litigation are made available to the Court and General Counsel as well as its index to its research material, VA administrative issues, and the history of all the VA regulations used in BVA appeals.

Upon reviewing Pub. L. 100-687, the Veterans' Judicial Review Act, we soon became aware that it would be necessary to extensively revise our existing Appeals Regulations and Rules of Practice to accommodate changes in the law. We used this opportunity to completely restructure these regulations. They had been revised on a piecemeal basis for a number of years and we felt that a complete revision would serve both to update them and to provide a more usable structure. For example, we have used the revision process to group together rules pertaining to similar subjects, to separate the regulations dealing with internal VA procedures from those which appellants need in order to process their appeals, and to provide a structure which will permit future expansion in a logical way. The new Appeals Regulations and Rules of Practice were published in the Federal Register for public comment on August 18, 1989. The final package, containing about 95 percent of the final regulations, is now being processed for Departmental concurrences and we hope to be able to print it in the Federal Register before the end of this year. A few additional changes are being made which were so extensive that we felt that a further opportunity for public comment would be required. These additional changes will be published for public comment at the same time that the majority of the changes are published in final form.

One change brought about by Pub. L. 100-687 which is having a significant impact on the Board is the amendment to 38 U.S.C. § 3404 permitting the charging of "reasonable" fees by attorneys-at-law and accredited agents and giving the Board the task of reviewing fee agreements on its own motion or the motion of one of the parties to the agreement. The statute also provides that the Board may require that fee agreements be filed with the Board at a time specified by the Board.

The Board is implementing this authority through changes in its Rules of Practice. We have asked that attorneys and agents file their fee agreements with the Board within 30 days of the date that the agreement is executed.

By mid-September of this year, we have processed several hundred fee agreement cases. To date, almost all of the fee agreements reviewed have been from attorneys rather than agents. We have been sending out notices of motions, final orders, and motion withdrawls. All the cases in which the Board has reviewed an agreement on its own motion have involved lack of compliance with the statute. Many attorneys were not aware of the effective date provision of the amendment to 38 U.S.C. § 3404 which provides that fees may not be charged in a case unless the Notice of Disagreement was filed on or after the date of enactment. We expect that we will soon be reviewing fee agreements in a great many more cases. We have also been working closely with VA's Veterans Benefits Administration to help them to prepare a circular which will go out to all field stations. This circular will deal with providing instructions to VA field offices on how to process cases in which the attorney's or agent's fees are to be withheld from an award of past-due benefits under 38 U.S.C. § 3404(d).

The changes precipitated by judicial review have required the BVA to extend assistance to attorneys and service organization representatives involved in litigation regardless of which side of the issue they are representing. We are expending considerable effort in providing information to interested parties on how to file fee agreements and motions as well as how to argue an appeal before the Board. The private bar has special needs since COVA has just been created. Most private attorneys are unfamiliar with the VA adjudication process.

This concludes my formal statement. I will be pleased to answer any questions you may have.

APPEALS STATISTICAL DATA - BOARD OF VETERANS APPEALS

	FY 1986	FY 1987	FY 1988	FY 1989	3 Quarters FY 1990
FIELD WORKLOAD DATA					
Appeals Filed (NODs)..........	63850	63570	67089	74291	49271
Dispositions..................	60677	62487	65603	73862	Unavailable
Pending - End of Period.......	45737	46625	48111	48540	Unavailable
BVA WORKLOAD DATA					
Receipts......................	43584	41491	43792	44229	34492
Dispositions..................	42003	41296	41607	38673	34690
% Allowed...................	12.8%	12.8%	13.5%	14.4%	13.5%
% Remanded..................	18.8%	20.7%	19.3%	22.1%	23.6%
% Withdrawn (and Other).....	1.3%	1.4%	1.1%	0.8%	1.1%
% Denied....................	67.2%	65.1%	66.0%	62.6%	61.8%
Pending - End of Period.......	14262	14457	16642	22198	22000
Benefits Granted by AOJ.......	1730	1781	1665	1618	1476
Benefits as a % of Remands....	21.9%	20.8%	20.7%	18.9%	18.0%
Formal VACO Hearings..........	1139	1192	1265	1304	930
Travel Board Hearings.........	645	665	641	600	330
Offices Visited...............	48	51	52	48	27
Categories of Appeals.........					
Disability Compensation.....	75.2%	75.7%	76.9%	76.5%	77.9%
Disability Pension..........	6.5%	6.1%	5.8%	5.4%	4.6%
Medical.....................	1.6%	1.3%	1.3%	1.3%	1.2%
Insurance...................	0.3%	0.2%	0.2%	0.2%	0.2%
Death.......................	6.1%	6.1%	5.8%	5.8%	5.8%
Training....................	1.8%	1.4%	1.3%	1.1%	1.2%
Waiver......................	5.4%	5.2%	4.6%	4.2%	3.8%
Loan Guaranty...............	1.7%	2.3%	2.3%	3.9%	4.0%
Reconsiderations............	0.7%	0.7%	0.7%	0.7%	0.5%
Character of Discharge......	0.2%	0.2%	0.2%	0.2%	0.2%
FIELD AND BVA COMBINED					
Elapsed Processing Time - Days	398	413	419	463	532
NOD to SOC..................	54	54	56	60	61
SOC to SA...................	55	57	59	60	59
SA to Certification.........	183	172	168	176	176
BVA Decision Time...........	106	130	136	167	192
Average Remand Time Factor..	**	**	**	**	44
Pending - End of Period.......	59999	61082	64753	70738	Unavailable
Field: NODs................	25448	25949	26425	25035	Unavailable
Subs. Appeals.......	20289	20676	21686	23505	Unavailable
BVA: Subs. Appeals.......	14262	14457	16642	22198	22000

** Information not available for prior years.

STATEMENT OF
JOHN C. BOLLINGER, ASSOCIATE LEGISLATIVE DIRECTOR
PARALYZED VETERANS OF AMERICA
BEFORE THE
SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
OF THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
CONCERNING
THE OPERATION OF THE BOARD OF VETERANS' APPEALS
AND THE
COURT OF VETERANS APPEALS

OCTOBER 4, 1990

Mr. Chairman and Members of the Subcommittee, on behalf of the members of Paralyzed Veterans of America (PVA), I wish to thank you for inviting us to testify today concerning the operation of the Board of Veterans' Appeals (BVA) and the operation of the new Court of Veterans Appeals (COVA). I will focus my comments today on the timeliness and quality of the appeals process, the impact of Public Law 100-687 on the Board of Veterans' Appeals, and our observations and assessment of COVA's operation at this early stage of the Court's maturation.

Although still in its infancy, the era of judicial review has reached a level of development which provides an increasingly clear picture of the appellate process under the provisions of Public Law 100-687. The implementation of new adjudicative and rule-making procedures as enacted by law and as molded by the interpretations of VA's General Counsel have set forth a substantive foundation upon which clearly defined practices are taking shape. As this process unfolds, the importance of Congressional oversight examination can not be overstated.

Before I begin our discussion of BVA and COVA, I would like to make a few remarks, on behalf of our membership, about the current Chairman of the Board of Veterans Appeals, Kenneth E. Eaton. Ken Eaton, quite simply, has been one of the best friends our nation's veterans have had in recent years. Throughout his distinguished and dedicated career with VA, he has always exemplified the pride, courage, and devotion of a leader who truly cares about those who have served this nation. Ken Eaton's fairness and compassion for those seeking VA benefits has been sincerely appreciated by PVA over the years. He is a good friend and we wish him well in every respect.

Board of Veterans' Appeals

Over the years, PVA has found the Department's claims and appellate process to be basically equitable and just. Technically speaking, the enactment of the Veterans' Judicial Review Act has, we believe, rounded out and perfected VA's appellate system to the degree that every veteran should be able to expect complete due process when filing a claim with the Department of Veterans Affairs.

To be sure, there have been serious shortcomings over the years. Emphasis on the two principal barometers of BVA's total operation - timeliness and quality - have seemed to fluctuate from year to year depending on various external pressures and demands. Reductions in staffing levels coupled with increased workloads have virtually eliminated the potential for concurrent improvement in both categories of timeliness and quality. Further, many of the problems affecting BVA are certainly not isolated within the Board. Most notably, the degree to which the Veterans Benefits Administration (VBA) is able to successfully process claims in an accurate and timely manner directly affects BVA's ability to serve veterans in the manner Congress intends.

On the positive side, BVA has made significant improvements in their response time on appeals submitted to the Board. Although the total elapsed processing time for an appeal - from the submission of a Notice of Disagreement at the VA regional office to a final decision at BVA - remains at an unacceptable 488 days, the Board itself has reduced its processing time from over 200 days last year to 150 days at the present time.

As we have stated before this Subcommittee in the past, there is always a trade-off between productivity and quality when processing appeals at BVA. Although we are certainly pleased to see significant improvements in response times, we must be concerned about the ramifications of certain practices at the Board which attribute to such favorable productivity statistics.

It is well known that the Board has been under significant pressure from Central Office to reduce the time it takes to dispose of a case. In response to direct orders from CO to achieve results in the area of improved timeliness, the Board has chosen one method to speed processing time which we believe violates the intent of Congress as expressed in title 38, U.S.C., Section 4002, regarding the composition of sections of the Board.

The "Veterans' Judicial Review Act" permits the Chairman to divide the Board into sections of three members. It further provides that if a section is reduced due to the absence of a member, a Board vacancy, or the member's inability to serve, the Chairman has three options: to assign another Board member to the section, to designate an acting member, or to direct the Board to proceed with its business without waiting for the assignment of a replacement member.

It is clear the statute intends that veterans are normally entitled to a three member board, but that in rare circumstances, the Chairman may authorize the temporarily decimated three-member board to proceed with less than a full complement. Nowhere in the Act does it authorize the Chairman to create two member boards. Nor does the act in any way condone the routine use of boards with less than three members. In short, the veteran is, except in unusual circumstances, entitled to the decision-making talents and scrutiny of three members.

This scheme has been violated as matter of routine practice by the Board. Approximately one-third of the Board's panels are composed of two members. Some panels were actually created as two-member sections. Additionally, some panels are two-member sections which have only one regular Board member. The second member of each of these boards is an acting Board member appointed by the Chairman under 38 U.S.C. section 4002(2)(A)(ii). This is significant because the Act provides that a section (referring to a normal three-member section) may not at any time have among its members more than one individual who is an acting member. By creating and operating two-member boards with only one regular Board member, the BVA violates the spirit of this provision.

Lastly, the manner in which the two-member boards are employed violates the statutory mandate regarding the decision making process of the Board. 38 U.S.C. section 4003 provides that decisions of the board will be made by the majority of the members of a section. When a case is assigned to a two-member section, a majority equates to unanimity. If the two members deadlock, the practice is for them to go to the Chairman or Vice Chairman who will assign a third member to break the tie.

In the past, and in all fairness, we believe the Chairman and Vice Chairman have acted in the best interest of claimants when exercising this authority. We further believe that these same individuals have treated veterans fairly when employing the use of administrative allowance (no longer an option for the Chairman).

This Subcommittee should be aware that the potential disadvantage for veterans will arise in the future when the combination of a new appointee and the routine use of two-member panels dominates the operation of the Board. This is for several reasons. First, there is subtle pressure on the members to reach agreement so as not to have to make special application for the assignment of a new member. Second, when such new member is assigned, it is one individual picked by the Chairman/Vice Chairman who, at the time of assignment, knows that the newly assigned member's vote will decide the case. In view of this, strict adherence to the intent of Congress in requiring the original use of three-member panels rather than the use of individually selected members to fill in a third opinion is, we believe, certainly in the best interest of all claimants.

This raises a third issue about two-member panels which we wish to bring to the Subcommittee's attention. The fact that two members of the board deadlock is, in fact, a finding that the evidence supporting the claim is equally balanced with evidence indicating the claim should be denied. Consequently, the application of 38 U.S.C. section 3007 requires that reasonable doubt must be resolved in favor of the claimant and the claim must be allowed. Obviously, this provision is not being applied in the case of two-member deadlock situations.

Since the Board has traditionally operated with 21 sections, the addition of section 22 and the subsequent addition of section 23 is an indication that the Board plans to continue to use the two-member board as a means of increasing productivity. For the reasons stated above, this will be at the expense of the due process rights of the veteran. We encourage aggressive oversight on the part of this Subcommittee to monitor this situation.

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As the era of judicial review gathers speed and far-reaching practices and rules are put in place, one of the concerns we have at PVA is the potential loss of BVA's independence due to the influence of VA's Office of the General Counsel (GC). In our support for the concept of judicial review, it was always our intent to protect the integrity of BVA's independence from external pressure. Providing claimants with the basic right of their "day in court" was always the goal. Maintaining a strong and independent BVA has always been considered an integral part of the appellate process by PVA. We are concerned that the Office of the General Counsel, while representing the Secretary in cases before the Court of Veterans Appeals, is also in the unique position of influencing, by the use of binding precedent opinions, the process by which BVA considers appeals.

One of the provisions of the Veterans Judicial Review Act was to give the General Counsel the authority to represent the Secretary before the Court. This is an exception to the general rule, established by 28 U.S.C. section 516, which makes the Justice Department the exclusive representative of the United States or its agencies in litigation. This has created a potential conflict.

38 U.S.C $ 4004 binds the Board to follow the precedent opinions of the General Counsel. In May, the General Counsel issued a precedent opinion holding that the passage of PL 100-687 extinguished the authority of the Chairman to grant "administrative allowances" of claims. This ruling eliminated the long standing practice of permitting the Chairman or Vice Chairman to allow a claim in lieu of establishing an expanded panel to further consider an appeal.

In August, 1990, the General Counsel issued a precedent opinion interpreting the Act as voiding reconsideration procedures previously established by the BVA. The General Counsel found that reconsideration vacates the original Board decision and requires a new decision by an expanded panel of the Board.

The General Counsel arrived at both of these precedent opinions by interpreting the wording and the legislative history of the Veterans Judicial Review Act. Both decisions have significant impact on the process by which the Board makes its decisions regarding the claims of veterans. Both are binding on the Board.

The control of the process of decision-making by the Board by the same attorney charged with defending the Secretary in actions brought to challenge the Board's decisions has created a potential conflict. For example, the General Counsel, faced with defending a Board decision based upon limited record evidence to support the denial of the veteran's claim, could request the Board to "reconsider" its decision. The BVA, bound by General Counsel's precedent opinion, must vacate its previous decision raising questions regarding the continuing jurisdiction of the Court. Again, complying with General Counsel's opinion, the expanded panel of the Board is empowered to take new evidence. Presumably this could take the form of a remand to the regional office for further development.

Please understand that we are raising this issue as a note of caution and as something to be monitored as the new relationship between the Board and General Counsel develops in light of the operation of the Court of Veterans Appeals. We firmly believe that the interest of claimants will best be served, now and in the future, by the preservation of the integrity of BVA's independence.

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Since the passage of the Veterans' Judicial Review Act in 1988, the nomination of BVA's new Chairman, as expressed in PL 100-687, has been an issue that has taken far too long to resolve. As you know, the new Chairman of BVA must be a Presidential appointee subject to the advice and consent of the Senate. In accordance with law, the nomination of the Chairman was to be effective February 1, 1990, and, with respect to the clear intent of both Senate and House Veterans' Affairs Committee, was to be submitted before any of the Presidential appointments other than the Secretary, Deputy Secretary, and Inspector General. Clearly, neither the interests of BVA nor those of veterans have been well served by the Administration's failure to resolve this issue in a timely manner over the past eighteen months. Top level management at the Board, currently lacking the endorsement of confidence which generally accompanies formal nomination, has been forced to perform the very difficult task of deciding the fate of tens of thousands of veterans' claims each year while the very fate of their careers has been held hostage to indecision on the part of the Administration. We are pleased that, finally, on September 21st of this year, the Administration submitted the name of a nominee to the Senate for consideration as Chairman of the Board of Veterans' Appeals. We are hopeful that the confirmation process is carried out expeditiously and thoroughly.

There are other examples of delays in the implementation of appointments mandated by PL 100-687 that ultimately affect veterans seeking appellate relief at BVA. In addition to the Chairman, the potential appointments of sixty-five Board members and the careers of numerous senior attorneys are at stake. In view of the fact that far too many Board members and senior attorneys have resigned from the Board over the past eighteen months in favor of continuing their careers in a more stable and certain environment elsewhere, we encourage the Administration to be especially cautious when appointing new members to the Board.

Further, recent budget negotiations which resulted in the proposal of the exclusion of the popular lump-sum federal pension option for government workers could, more than likely, produce an exodus of retirement-age employees. This will certainly affect BVA as well as all employees of the Department of Veteran's Affairs.

Since the work of BVA is unique and requires extensive training, every effort should be made to provide the Board with members who have in-depth experience and knowledge regarding veterans benefits and health care issues. The matter of experience becomes particularly important at this time when almost one third of the BVA's staff attorneys have been on the job for less than twelve months. We firmly believe that the interest of all claimants will best be served when the current Board offers a higher degree of stability and security for its members and attorneys.

Court of Veterans Appeals

Mr. Chairman, there are several items relating to the operation of the Court of Veterans Appeals (COVA) which I would like to bring to your attention.

On September 18, 1990, H.R. 5657 was introduced and referred to the House Committee on Veterans' Affairs. An amendment to the Veterans' Judicial Review Act, this legislation would make certain technical changes to several provisions contained in PL 100-687. While some of the bill's provisions would merely serve to make the Judicial Review Act internally consistent or make other minor corrections, others would have a direct affect on the due process rights of veterans.

The legislation would repeal the requirement that the Court include in its decisions conclusions of law and its determinations regarding factual matters. It would also extinguish the statutory right of a veteran to request reconsideration by a panel, an expanded panel, or the Court en banc. We strongly oppose the elimination of these rights, at least at this early stage of life of the Judicial Review Act.

The Court has only recently been brought to its full strength of seven judges. It is still struggling with its location in permanent quarters and finding and training professional and clerical staff. Understandably, to date the Court has issued only 13 decisions. To our knowledge, there has been only one decision of the Court noticed for appeal to the U.S. Court of Appeals for the Federal Circuit, and that appeal was voluntarily dismissed as moot. Until the Court has been in full operation for a period of time, has been faced with a full range of issues to resolve and has issued a wide range of opinions, we do not see how the veteran is served by relieving the Court from the obligation of explaining its decisions by setting forth "a statement of its conclusions of law and determinations as to factual matters." Indeed, in wording the Act as it did, Congress acknowledged a basic right that flows through the claims adjudication system - - the veteran has the right to know the reasons for a particular decision on his claim.

Additionally, the explanations given by the Court at this early stage of its existence are important because the Court's decisions must be applied by the Board of Veterans Appeals when deciding similar cases, by the Secretary when the validity of regulations is at issue, and by Veterans Service Organizations in representing future claimants. Cursory decisions with no explanation and with an inadequate exposition of the factual background will make application of the Court's decisions in future cases difficult. Further, the absence of rationale for legal conclusions and factual findings severely inhibits the ability of the veteran to pursue his right to appeal the Court's ruling on the validity or interpretation of statutes to the U.S. Court of Appeals for the Federal Circuit.

Mr. Chairman, we believe that the House Committee on Veterans' Affairs acted properly last year by voting to enact the provisions set forth in H.R. 3343 which require VA to provide claimants with the rationale and summary of evidence at each stage of the adjudication process. We believe, at this time, that COVA should also adhere to the philosophy of thorough explanations of its conclusions and determinations.

Finally, H.R. 5657 would eliminate the statutory right of a veteran to petition for expanded panel consideration of his claim. While the Court could, on its own, provide for such a petition without the embodiment in statute, there is no advantage to the veteran to the repeal of this provision. Certainly the extinction of the statutory basis for this petition would have implications on any right a veteran may have to appeal an adverse decision on such a petition.

Time may prove these concerns unfounded but, quite simply, it is too early to begin eroding due process rights of veterans already contained in the Act without a strong demonstration that those protections are not needed or otherwise severely impair justice.

PVA has no objections to the remaining portions of H.R. 5657. We heartily endorse the new Section 4068 which provides for a Judicial Conference. We also believe that the amendment of 38 U.S.C. Section 4132(b)(2) to permit certain restricted medical information to be filed with the Court or with other Federal Courts under seal adequately protects the privacy rights of veterans while providing for orderly judicial review of their cases.

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PVA would like to comment on one problem the Court is facing - that of pro se appellants, i.e., claimants who appeal to the Court but have no representative to assist them. Currently the Court has docketed some 1,200 cases. Of these, about 700 appellants have come to the Court without representation. The Court, to date, has made every effort to protect the rights of veterans who have appealed on their own, however, it saps a great deal of the Court personnel's time and energy dealing with such a large volume of pro se veterans. It is difficult enough for judges and their law clerks to come to grips with and formulate a new body of law without having the added burden of having to literally decipher the appeals which are prosecuted by persons with no knowledge of Court procedure.

The burden is made more difficult by the abrupt change from a claimant-oriented administrative claim system to an adversarial system once a Notice of Appeal is filed. The Court is currently studying this problem and attempting to find solutions. We want to mention it to the Committee at this time to let the Committee know that PVA views this as a serious problem that affects the quality of judicial review available to all veterans. If the Court, after it completes its study, should seek some assistance from Congress, we believe such a request warrants your serious consideration. If the old adage that a manager spends 90 per cent of his or her time dealing with 10 per cent of the people has any validity, the Committee can imagine the impact on the quality of judicial review when the Court must devote an inordinate amount of time to 60 per cent of the appellants because they are unschooled in the requirements of Court review.

Some of the Veterans Service Organizations have developed programs for providing judicial representation and are actively representing veterans before the Court on a regular basis. PVA has two staff attorneys who do this work. One full time and the other part-time. We also have three certified non-attorney claims representatives who will be presenting cases to the Court in the future. PVA does not charge for its representation.

We believe, however, that the key to the solution of the "pro se" problem lies in focusing attention outside of the nation's capitol. Veterans were called to service from every small town in every state of the Union as well as from our possessions and commonwealths. When their service was finished they returned home. The Court is somewhat unique in that it does not sit in a political subdivision which contains even a small fraction of its total potential appellants. In our view, veterans need to be matched with legal resources close to where they live.

We do not see any one solution to this problem, but rather a combination of approaches. We do, however, see it as a problem that cannot be ignored.

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Mr. Chairman, that concludes my testimony. I will be pleased to answer any questions you may have.

STATEMENT OF
RICHARD F. SCHULTZ
ASSOCIATE NATIONAL LEGISLATIVE DIRECTOR
DISABLED AMERICAN VETERANS
AND
EDWARD J. KOWALCZYK
ASSOCIATE NATIONAL SERVICE DIRECTOR FOR CLAIMS
BEFORE THE
SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
OF THE
HOUSE COMMITTEE ON VETERANS AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
OCTOBER 4, 1990

MR. CHAIRMAN, AND MEMBERS OF THE SUBCOMMITTEE:

On behalf of the more than 1.3 million members of the Disabled American Veterans (DAV) and its Ladies Auxiliary, I wish to thank you for the invitation to appear here today to present our views relative to the operation of the Department of Veterans Affairs (VA), Board of Veterans Appeals (BVA) and the U. S. Court of Veterans Appeals (COVA).

Before proceeding with our testimony Mr. Chairman, we wish to once again commend you and the members of the Subcommittee for your unwavering commitment to our nation's veteran population who seek redress of their grievances relative to the decisions rendered on their claims for benefits by VA. Clearly, the oversight activities of this Subcommittee has had a positive impact on the timeliness and quality of the decisions rendered by BVA.

In your letter of invitation to testify, you indicated your desire that we present our assessment of the performance of BVA with particular emphasis on timeliness and quality in the appeals process both at BVA and at Veterans Benefits Administration (VBA) field offices. Further, you requested our views regarding staffing needs at BVA and the impact of Public Law 100-687, the "Veterans' Judicial Review Act", on BVA.

Mr. Chairman, I am accompanied here today by Mr. Edward Kowalczyk, Supervisor of DAV's COVA office who will address issues relative to COVA.

Mr. Chairman, as you are aware, DAV's membership consists of honorably discharged veterans who were wounded, injured, or otherwise disabled in wartime service to this nation. Obviously, our primary concern is to assure that service-connected disabled veterans, their dependents and survivors receive the VA benefits and services they so rightly deserve. DAV services are not, however, restricted solely to service-connected veterans, as we offer counseling and representation to all veterans and their families on any claim they may pursue for benefits administered by the VA. DAV services are free of charge and without regard to membership in our organization.

In order to ensure that our nation's veterans and their families receive VA benefits to which they are entitled, the DAV employs approximately 290 full-time, professionally trained, National Service Officers (NSOs) located throughout the country. While DAV NSOs provide counseling on a wide range of VA benefits and services, the majority of their activities are dedicated to assisting and representing veterans and their dependents on their claims for compensation, pension and survivor's benefits at VA regional offices (VAROs).

To ensure that each individual VA claimant receives complete and thorough DAV representation throughout the claims processing system, the DAV also maintains a National Appeals Office in Washington, D. C. This office is staffed by 12 highly skilled National Appeals Officers (NAOs), a staff counsel, and a medical consultant whose primary responsibilities are to ensure, in all cases where DAV has been appointed as the individual's representative, that each appeal is clearly and accurately articulated in its most favorable light to BVA.

Since the enactment of the Judicial Review legislation, DAV has maintained a highly skilled staff at COVA currently consisting of three National Service Officers and three Staff Counsels. Information regarding the activities of this office will be presented later in this statement.

Mr. Chairman, as you know, the mission of the VA is to serve America's veterans and their families with dignity and compassion, and to be their principle advocate in assuring that they receive the care, support and recognition earned in service to this nation. Within the VA, the Veterans Benefits Administration (VBA) is charged with the responsibility of ensuring that an appropriate level of benefits are provided within the law to eligible veterans, their dependents and survivors.

In order to ensure that VBA, through its regional offices, is granting all benefits authorized by law to veterans, their dependents and survivors, there exists a Board of Veterans Appeals. The objectives of the BVA appellate program are outlined in MBVA-1, Part 1, as follows:

> 1.04 Objectives of the Appellate Program
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> A. Major. Major objective is to equitably decide appeals under all laws administered by the VA, with sympathetic, understanding, as expeditiously as possible, consistent with quality, in order to grant all benefits to which veterans and their dependents are entitled.
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> B. Specific. Specific objectives are:
> 1. To promulgate quality decisions which are equitable, comprehensive, fully reasoned and self-sustaining.
> 2. To maintain a high level of promptness in deciding appeals consistent with the quality of decisions expected of an appellant agency of last resort.

To accomplish these objectives, BVA is organized into 21 board sections. Each board section is comprised of three members: a chief member (attorney), a medical member (physician), and a legal member (attorney). In addition, BVA employs approximately 150 "attorney reviewers" as well as an administrative staff to assist the Board in rendering quality decisions in a timely manner.

QUALITY REVIEW

In an effort to assure that our nation's veterans and their families receive fair and equitable appellate decisions, the Board of Veterans Appeals has in place a quality review program whose objectives, as stated by BVA, are:

> 1. To assure that all appellate decisions will meet the Board's standards of substantive accuracy and legal sufficiency;

2. To assure that all written decisions convey the Board's findings clearly and effectively with compassion and sensitivity towards the veterans and their dependents; and
3. To assure that a certain level of consistency is maintained among decisions in Board sessions, while still preserving the Board member's decision making independence.

Initially, all Board decisions are subject to a review by the Appellate Index and Retrieval System (AIRS). This staff, composed of attorney reviewers, has the primary responsibility to conduct an editorial review of proposed BVA decisions. Basically, this level of review examines decisions for typographical and format errors. Decisions found to contain an error are referred to the next higher level of quality review.

The second stage of quality review is conducted by select senior attorneys who conduct an in depth review of decisions referred to them. Lastly, all final decisions are again screened for errors, indexed and placed in BVA's decision data base.

During fiscal year 1989, 24 percent of all BVA decisions were subject to the second stage of quality review. During the first nine months of fiscal year 1990, 16.8 percent of all BVA decisions rendered had been referred to the second level of review.

Mr. Chairman, we believe that BVA's quality review system represents a sincere and bona fide attempt on their part to ensure that BVA appellate decisions are fair, equitable and consistent with the intent of Congress. How well this system is working will, in some measure, be determined by the new Article I Court. DAV, through its National Appeals Office and our COVA office will also continue to closely monitor the quality of decisions being rendered by BVA.

TIMELINESS

Mr. Chairman, as you are painfully aware, the amount of time it takes to render a decision on an appeal of a denial of VA benefits has dramatically increased since Fiscal Year 1986. At that time, the average time for an appeal to be completed was 398 days. As of the end of June, 1990, this figure stands at 488 days. By any reasonable standard, Mr. Chairman, this is an intolerable amount of time for needy veterans and their families to wait for a decision of an appeal for benefits from the VA.

Mr. Chairman, there is some good news on this front. At a recent briefing conducted by Mr. Roger Bauer, who is currently running the day-to-day operations at BVA, we were informed that BVA has been successful in drastically reducing the time it takes BVA to render a decision on an appeal. Their statistics show that at the end of December, 1989, the average processing time of an appeal at BVA was 238 days. Remarkably, the projected average processing time for the end of September, 1990, stands at 148 days. A full 90 days has been slashed from the processing time of an appeal during the last nine months! This, Mr. Chairman, in our view, is phenomenal -- especially in view of the fact that no new FTEE were made available to accomplish this feat and considering the fact that there are six board member vacancies at this time.

Mr. Chairman, we believe that several factors are responsible for the rapid decrease in the time it takes BVA to render a decision on an appeal. These include: streamlining written decisions; allowing two board members to render decisions in approximately 50 percent of all appeals; and increasing the number of appeals decided annually by each FTEE to 115.6, up from approximately 93 in Fiscal Year 1989.

While DAV certainly applauds these efforts, we must caution that the quality of an appeal decision must not suffer at the expense of timeliness.

Mr. Chairman, we believe that there is a correlation between the increased number of appeals being decided by board members and the fact that, to date, not one board member has been reappointed as required by Public Law 100-687. As you know, this act requires that the Chairman of the Board of Veterans Appeals, with the advice and consent of the Senate, shall be appointed by the President for a six year term. Individual board members are to be appointed for a nine year term by the Secretary with the approval of the President, based upon the recommendation of the Chairman. The initial term of board members will be staggered with 22 board members being appointed for a three year term, 22 for a six year term, and 22 for a nine year term.

Nearly two years have elapsed since the enactment of Public Law 100-687. To date, no official announcement has been made by the Administration regarding the President's nomination for a Chairman of BVA. As you may recall, the explanatory statement of the "Veterans Judicial Review Act" stipulates that "the Committee intends the nomination for Chairman to be submitted before any new presidential appointment (other than Secretary, Deputy Secretary, and Inspector General)." Mr. Chairman, we believe such a long delay in appointing a Chairman and board members does not bode well in terms of morale and places undue pressures on board members to produce ever increasing numbers of appeal decisions in an effort to secure reappointment to the board at the maximum term.

In this same vein, Mr. Chairman, we note that of the approximately 150 non-board member attorneys, more than 40 have been employed at BVA one year or less and more than one third have less than two years service. We are of the opinion that the high turnover rate of these attorney reviewers, some of whom are senior attorneys with several years experience, is, in large measure, directly related to the uncertainties surrounding the appointment of a Chairman and board members and the ever increasing caseload that must be handled in order to meet new timeliness standards. We believe the ability of BVA to retain quality attorney reviewers is being negatively affected by the uncertainties generated by the extended delay in nominating a Board Chairman. We urge the Administration to move quickly with its nomination of a BVA Chairman and appointment of its board members.

Mr. Chairman, in further discussion on the subject of timeliness, we would like to recognize the additional steps being taken to reduce the administrative delays in BVA's appeals process. Currently, the administrative processing of appeals makes up 25.8 percent of BVA's appeal processing time. Any effort by BVA to reduce the slow administrative process at BVA is certainly welcome.

Mr. Chairman, another area of some concern to DAV is the backlog of traveling board hearings at some regional offices. As you know, the new VA Form 1-9 informs appellants of their right to appear personally at their local VA office to appear before a traveling section of BVA. We are aware that some of the larger regional offices have backlogged hearing requests which would delay travel board hearings up to three years, should BVA not schedule additional dates for these traveling sections. The St. Petersburg, Florida, regional office, over a four month period from May through September, has received 75 requests to appear before the traveling BVA Section. It becomes readily apparent that they will be unable to accommodate these requests, given the fact that six months remains until the next scheduled BVA travel section will be hearing cases at that regional office; and that generally the board only has been scheduling between 15 and 20 appearances during any given visit.

We are cognizant of the fact that VA Form 1-9 does inform appellants of the potential delay due to limited travel resources. Also, some regional offices are informing appellants of these delays. However, we would hope that all regional offices are notifying individuals of delays in appearing before BVA's traveling section. We would also like to see more dates scheduled at those regional offices experiencing long delays so that all appellants throughout the country would have equal access to local BVA hearings.

REMANDS

Mr. Chairman, just a brief comment regarding remands. Each year since Fiscal Year 1985, the rate of remands by BVA to ROs has increased. The current remand rate stands at 23.6 percent. Nearly one in four appeals are returned to ROs, by BVA, for further development. Obviously, Mr. Chairman, this high remand rate, while not considered by VA in the current timeliness data, does add considerable time to the appeal process. A GAO Report, which we will quote from extensively later in this statement, determined that had BVA remands been counted, the average time it took to decide appeals in fiscal year 1988 would have increased from 419 to 457 days.

Mr. Chairman, while we recognize that the advent of COVA has influenced the Board's decision to remand certain cases, we believe the ever increasing number of remands is an indication of a much larger, chronic problem within VBA. Again, we direct your attention to the GAO Report on this issue, discussed later in this statement.

Mr. Chairman, another area of concern to DAV is the length of the process of establishing new BVA Rules of Practice. As you know, proposed rules were published for comment in a July, 1989, issue of the Federal Register. We look forward to the publication of these final rules and would hope that this will occur in the near future.

Mr. Chairman, with your indulgence we would like to take a moment to express DAV's heartfelt thanks and sincere appreciation to former Chairman Ken Eaton for his nearly 30 years of dedicated service to America's veterans. Ken began his distinguished career with VA as an Adjudicator in Portland, Oregon, in 1961, transferring to BVA in May of 1962. Over the next 20 years, Ken gained a reputation among his peers, VSOs and members of Congress as being an extremely competent, fair, and hardworking individual who always looked out for the best interest of our nation's veterans. His elevation to the Chairman of Board of Veterans Appeals in February 1982 is a testament to this outstanding individual, who is applauded by all in the veterans' community.

Mr. Chairman, as you know, Ken is currently waging a fierce battle against a major disease threatening his health. I know you, as well as all of us who have been privileged to know and work with Ken, wish him the very best and God's speed in recovering from his current health problems.

Mr. Chairman, as mentioned earlier, your letter of invitation to testify also requested our comments regarding the appeals function at VAROs. DAV recently presented our observations regarding this issue at a hearing held by this

Subcommittee on July 26 of this year. In that statement, we drew the Subcommittee's attention to a GAO Report (GAO/HRD-90-62, May 1990) which identified a number of problems relative to regional offices' processing of appeals. With your indulgence, Mr. Chairman, I would like to repeat that portion of our July 26th statement which quotes from the aforementioned GAO Report:

> VA has not identified the reasons for delays in the appeals process, nor the reasons for the wide variations in processing times among regional offices. It lacked data to identify systemic problems and to identify regional differences. Other management weaknesses that contribute to lengthy processing times included (1) a lack of time standards to measure performance, (2) ineffective guidance and oversight and, (3) a failure to correct known problems. Moreover, VA does not accurately report the time for the appeals process, resulting in a lack of accurate oversight data not only for VA but for the Congress as well. By improving management, VA can improve the time it takes to process appeals and the accuracy of reporting without adversely affecting the quality of decisions.
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> VA reports show that the average time spent by the regional offices and the Board of Veterans Appeals to process appeals decided by the Board was 419 days in fiscal year 1988. The regional offices spent an average of 283 of the 419 days. The average processing time ranged from 172 to 623 days among VA's 58 regional offices even though the process is the same for all offices. Thus, depending on where veterans file appeals, some wait much longer than others for decisions. VA has not determined the reasons for these wide variances.
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> VA needs to better manage the appeals process. Currently VA lacks (1) the necessary data on the regional offices' appeals processing to identify innovative practices or systemic problems to develop corrective action, (2) adequate time standards to provide incentives for regional offices to identify and avoid delays and to promote more uniformity in processing times, (3) effective guidance and oversight of the regional offices, thus some offices established procedures that lengthened the process and some circumvented VA requirements to reduce their reported processing times, and (4) a focal point to ensure that the units involved cooperate to effectively process appeals, so that processing and reporting problems can be resolved promptly.
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> and
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> The time VA reported to process cases decided by the Board of Veterans Appeals was understated. VA did not include time spent by the regional offices on appeals the Board returned to them for additional development. The regional offices spent an average of 282 additional days on about 5,500 cases that they returned to the Board for a final decision in fiscal year 1988. If included, this time would have increased the fiscal year 1988 average processing time from 419 to 457 days. Thus, VA management, the Congress, and others who use the data have an inaccurate perception of how long veterans actually wait for decisions.
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> VA does not gather data nor report the time spent on appeals resolved in the regional offices -- about 45

percent of all appeals. Thus, VA management has no basis for accurately determining how promptly such appeals are resolved.

Mr. Chairman, it is readily apparent that much work lies ahead for VBA if they are to gain control and solve the major crisis in their appeals process. We are encouraged by VA's response to the above cited GAO Report and look forward to working with VA and the Congress to alleviate this intolerable situation.

U. S. COURT OF VETERANS APPEALS

Mr. Chairman, it is an honor, as the Supervisor of the DAV's Court of Veterans Appeals' Office, to appear before your Subcommittee and state our views, on the operation of the newly-established United States Court of Veterans Appeals (COVA).

With the enactment of the Veterans' Judicial Review Act, the DAV saw an immediate need to continue its legacy of professional claims service to our nation's disabled veterans and their dependents before this new Court. The act itself provides a unique vehicle for the DAV to do so, since non-attorney representatives are allowed to practice before this Court in the same manner as attorneys.

In September of 1989, when COVA opened its doors for business, the DAV opened its COVA office in the same building with the Court. In the first eight months of the Court's existence, the DAV was the only veterans service organization to provide representation before COVA.

In the first year, the DAV provided representation for almost 300 claimants before COVA. The DAV COVA staff filed the first represented claim with the Court, briefed the first case, provided the first oral argument by a non-attorney, and won the first fact-based decision. Today, the DAV continues as the major provider of representation before the Court. Of the total represented cases on the Court's docket, the DAV represents 61 percent of the claimants.

We have found the Court to be very receptive to the needs of this nation's veterans and their dependents, and wish to compliment Chief Judge Nebeker and his staff. As you are aware, Mr. Chairman, the Court is, and will be, confronted with many unique problems, but we are extremely confident that under the leadership of Judge Nebeker, solutions will be found.

One of the problems the Court is currently faced with concerns claimants who have filed appeals with the Court in a pro se capacity. As last count, 59 percent of the Court's total docket is made of veterans who have filed appeals in which they are representing themselves. The Court is faced with considerable difficulty dealing with its pro se appellants, as many are unfamiliar with proceedings before the Court, its jurisdiction, and the nature and scope of the Court's review. This problem is not likely to disappear and poses a major hurdle for COVA.

Recently, we have encountered problems dealing with unusual actions taken by VA General Counsel. For example, they have established a policy impeding our ability to review, at the request of a claimant, his or her VA claims file prior to the filing of an appeal with the Court in order to determine if the claimant has a case eligible for appeal to the Court. VA General Counsel requires the claimant file an appeal pro se with the Court before the claims file is called to Washington and made available for our review. We find this policy to be obstructive and uncalled for. Also it will unnecessarily inflate the Court's docket with non-represented claimants.

Another example of our frustration in dealing with VA General Counsel centers around DAV represented cases where we have already filed a brief with the Court. In an unprecedented move, General Counsel has decided to refer these cases, without prior Court approval or DAV acquiescences, to the Chairman of BVA for reconsideration of the BVA decision which the claimant has already appealed to COVA. The BVA, under its new procedure, vacates the prior BVA decision, holding it to be of no force and effect, thereby devesting the Court of jurisdiction of review. The BVA Chairman then advises the claimant that the reconsideration decision, once promulgated, will replace the former decision and constitute the final Board of Veterans Appeals decision to which the claimant has 120 days to appeal to the Court.

As you can readily deduce from this scenario, such action frustrates judicial review. It gives the Secretary an additional "bite of the apple" and allows the Secretary an unfair advantage in that the BVA Chairman can order additional development of the claim. Under this procedure, COVA may not be given the opportunity to render precedent decisions correcting the Secretary's procedural deficiencies or questions of law or fact within the scope of the Court's review. These questions would, in the alternative, be addressed by the BVA on reconsideration on a case by case basis. This is an incredulous move by the General Counsel placing appellants before the Court at a distinct disadvantage; we take strong exception to this mode of operation.

Mr. Chairman, as you well know, the DAV has worked long and hard with the Veterans Affairs' Committees of both the House and Senate concerning judicial review and establishment of COVA. The recent policy decisions by VA General Counsel certainly do not lend themselves to the original intent of Congress in making judicial review and COVA a reality.

This concludes testimony, Mr. Chairman. We would be pleased to respond to any question from you or members of the Subcommittee.

STATEMENT OF

ROBERT D. MANHAN, SPECIAL ASSISTANT
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

THE CURRENT PERFORMANCE OF THE BOARD OF VETERANS' APPEALS AND THE IMPACT OF JUDICIAL REVIEW ON THE BOARD

WASHINGTON, D. C. OCTOBER 4, 1990

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for inviting the Veterans of Foreign Wars of the United States (VFW) to participate in this Subcommittee's oversight hearing on the operation of the Department of Veterans Affairs' (VA) Board of Veterans Appeals (BVA) and on the operation of the U. S. Court of Veterans Appeals (COVA). It is my privilege to represent the 2.8 million members of the VFW, to include our Ladies Auxiliary this morning.

As you recall the VFW swore in Mr. James L. Kimery as our Commander-in-Chief at our recently completed 91st National Convention. His theme, **Vanguard of Excellence**, is the spirit in which we have approached this hearing, i.e., being critical with the purpose of improving these functions in order to better serve the entire veteran's community.

The VFW testimony will focus on the current performance of BVA with emphasis on timeliness in the appeals process; the quality of the appeals function at both the field level (Regional Offices) and BVA level; staffing needs at the BVA; and the impact of Public Law 100-687 on the Board.

BVA WORKLOAD: During FY 1989 the Board had a workload of 60,871 cases. They rendered decisions on 38,673 cases for a 63.5 percent completion figure. The average processing time within BVA was 167 days or about 5 1/2 months. The Board's average staffing strength was 414 full time employees.

For the first 11 months of FY 1990, that is from October 1, 1989 to August 31, 1990--until about five weeks ago--the Board had a workload of 56,690 cases. They rendered decisions on 34,690 cases for a 61 percent completion figure. The average processing time within BVA was 205 days; this figure includes the high of 238 days of response time in December 1989 to the very favorable August 1990 response time of 146 days which was just under five months. The Board presently has 405 full time employees.

BVA TIMELINESS: The Board uses two separate and distinct indicators to measure this factor. The first is **total processing time**. This accounts for all time that elapses from when a veteran/claimant first files a notice of disagreement (NOD) to the time a BVA decision is rendered. This includes all the various appeals processing stages accomplished at the field or Regional Office (RO) level and all procedural steps that are the responsibility of the claimant, which often includes seeking assistance from veterans organization's service officers.

The second measure is **BVA response time** on appeals. This is limited to the appeals processing steps that are the responsibilities of the Board. This action is primarily a function of the number of assigned personnel at the Board and the rate at which appeals are being received.

The **total processing time** on a VA appeal at the end of FY 1989 was 463 days or 15 1/2 months. This is a seven week longer period of time compared to FY 1988. The most current figure for 3rd quarter FY 1990 reflects 488 days or 16 months; an increase of three weeks over FY 1989.

The total **BVA response time** at the end of FY 1989 was 210 days or seven months. This is about two months longer when compared to the end-of-year BVA response time in FY 1988. The most current figure for 3rd quarter FY 1990 reflects 192 days; an improvement of 18 days for timeliness.

The VFW believes both of the above measurements of time will continue to increase for the following reasons. First, the volume of NODs filed at the ROs for FY 1989 was 74,291; some 7,200 cases more than the previous year. Through the 3rd quarter FY 1990 some 49,271 appeals have been filed. Therefore, the volume of work through FY 1990 and at least the first half of FY 1991 will continue to be very high. Second, is the personnel turbulence BVA is experiencing particularly in the professional attorney ranks. Said another way, many experienced BVA attorneys have departed over the past year for a number of reasons. To further compound this problem, which has a direct bearing on timeliness, is the fact that under the provision of Title II, P.L. 100-687 all the Board members must be newly appointed. This law requires 21 members be appointed for a three-year term, 22 for a six-year term, and 22 for a nine-year term. It further stipulates that an individual who is serving as a member of the Board may continue to serve until the earlier of the date on which the individual's successor is appointed or the expiration of the 180-day period after the Chairman is appointed. As we all know, in late September Mr. Charles Cragin was nominated for this position but no hearing dates have been established. However, at this time there are seven vacancies within the existing 21 BVA hearing sections. This staffing problem is compounded by the fact that no presently assigned BVA member knows if he or she will ultimately be appointed to any one of the authorized 63 hearing section positions. The VFW believes that the longer it takes to appoint the Chairman, the more likely a sense of frustration and a lack of confidence in the future will prevail within these working sections. This atmosphere is bound to adversely effect both the quality and quantity of BVA decisions rendered on behalf of veterans. To further compound this problem the presently assigned 150 attorneys who do the research and writing for the hearing sections, currently have 40 members who have 12 or less months of BVA staff experience. We believe this staffing problem will first affect the BVA response time and if left unchecked will ultimately affect the overall quality of cases being processed.

QUALITY OF APPEALS: Of all the 38,673 cases BVA disposed of in FY 1989 5,568 cases were allowed and 8,546 were returned to respective ROs for further development. Another 24,209 cases were denied which meant the original field decision was sustained. A total of 309 cases were withdrawn by the claimant before a decision was rendered. The allowed cases represented 14.4 percent of the FY 1989 workload. This approval rate is higher than the FY 1988 allowance of 13.5 percent or any other year going back as far as FY 1976. It is interesting to note the allowance rate through the 3rd quarter of FY 1990 is 13.5 percent. Of equal importance is the FY 1989 remand figure of 22.1 percent. It is the highest remand figure for any completed year again going back more than a decade. The remand rate through the 3rd quarter of FY 1990 presently stands at 23.6 percent. The VFW believes the allowance figure and the remand figure together indicate the overall quality of decision-making at the field level has deteriorated. Stated another way these figures indicate about 37 percent of all cases heard since October 1, 1988 to July 26, 1990—a period of the last 21 months—should have been either approved at the RO or further developed there prior to a decision being made not to allow the case in the first place. However, in all fairness to the field adjudication staffs we recognize the fact that several categories of cases are rather complex, such as issues involving Agent Orange, exposure to ionizing radiation, post-traumatic stress disorder (PTSD), and incarceration as prisoners of war. In addition, the ROs are facing a large volume of claims action at the same time they have undergone personnel realignments and reductions. To address many of these problems, field adjudicators are attending a formalized six week Adjudication Training Academy. The VFW did discuss all the field problems in great detail before this Subcommittee in a July 1990 oversight hearing. In sum, we strongly believe the present Chief Benefits Director of DVA, General D'Wayne Gray (USMC Retired), is well aware of both the quality of decisions being rendered and the fact that some 37 of the 58 ROs take between 8 to 20 months of time just to process a claim before they reach BVA. In fact, the General Accounting Office (GAO) report of May 1990, entitled "Improved Management Needed to Reduce Waiting Time for Appeals Decisions", addresses this problem. They conclude:

> We analyzed selected staff and work load data for the 58 regional offices to determine how they relate to processing times. We could not identify any one factor that was a primary reason for variations in processing time.
>
> p.14 GAO/HRD-90-62

STAFFING NEEDS: The VFW strongly supports a BVA workforce of 427 employees. In fact this is the figure also used in the House passed VA Appropriation, H.R. 5158, on June 28, 1990. This figure is 24 more than the BVA staff of 403 recommended in the President's VA Budget for FY 1991. Our rationale for 427 employees is based on the previously mentioned large number of notices of disagreements already filed in the field, the present BVA response time and the additional factor of the increasing popularity of Travel Board Hearings and generally more personal hearings in Washington, D. C. In FY 1989 the BVA conducted 1,904 formal personal hearings. Of these 1,304 were held in Washington, D. C. and 600 before traveling sections of the Board at 48 different field stations. In addition, the Board rendered decisions on almost 8,500 appealed cases held in the field with Regional Office personnel acting on behalf of the BVA. This program has been very well received by the VFW accredited field service officers. We would very much like to see this effort extended primarily because it does expedite the long mechanical delays in the total processing time. However, we realize it takes fully qualified BVA personnel away from their Washington, D. C. location to participate in this project.

IMPACT OF P.L. 100-687: Veterans' Judicial Review Act-Veterans' Benefits Improvement Act of 1988 was signed into law on November 18, 1988. Its direct effect upon BVA is significant because Congress now allows courts to review VA policy by a body which is not bound by the VA's view of the law. This was an action strongly supported by the VFW over a period of many years.

As previously mentioned, the Executive Branch of the federal government should move quickly to appoint the first Chairman of BVA. The Chairman will be independent of the Administrator of VA. Again, we ask the same professional courtesy be given to appointing the first 63 section members of BVA for all the reasons outlined on pages 3 and 4 of this statement.

VFW is aware the BVA is now preparing their decisions in a more detailed format which includes the key new section entitled: **The Evidence.** This body of information serves two purposes: first for the claimant and/or his representative to better understand the rendered BVA decision; and, if the case is appealed to COVA, to allow that body to determine if BVA in fact rendered a proper and equitable decision on the available documentation.

The VFW has also noted a difference in the "tone" of more recent BVA decisions. Specifically, in cases that are denied because they have no merit, the previous paternalistic or gracious rationale is no longer used.

At this point in time BVA, like the VFW, is closely monitoring the Court's arguments on cases they have reviewed to determine what their expectations are and what their jurisdiction is. But we have no doubt that COVA very closely reviews each appeal. An example of what we mean was seen in case Number 89-141, decided on September 19, 1990. The COVA decision stated in part:

> In this case, a one-time use of the incorrect standard . . . in a decision that stated the correct standard . . . eleven times, although harmless under the circumstances did create some confusion in an otherwise well-drafted and well-reasoned decision. The decision by the Board is affirmed.

A mechanical problem this service organization is presenlty experiencing is how to best review the C-file of a veteran whose case was denied at BVA and who now wishes to appeal to COVA. At the present time it is only after the veteran files a Notice of Appeal (NOA) with COVA and a copy to the VA's General Counsel that his C-file will be brought in from the field. However, before our COVA accredited service officers may review the documentation to determine the merits of an appeal, we are required to accept the case to proceed with COVA action. In our judgment this is too arbitrary and works to the disadvantage of the appeal system by clogging the court with cases they should not review.

To avoid this problem the VFW is using one of the following two methods to review the facts of a case. We ask our accredited field service officers to review the C-file at the RO and give us his assessment of filing a COVA appeal. This course of action has the advantage of being rather quick; but, the disadvantage is the difference in the experience level regarding what is necessary to present a COVA case as opposed to the VA's appeal requirements. The alternative is to ask the RO to send a xerox copy of the entire C-file for our review. We cite the Freedom of Information Act to obtain the documentation. This course of action has the advantage of allowing us not to accept a case we believe has no merit. However, the significant disadvantage is the VA's cost in time and money to respond to this requirement. In conclusion, the VFW believes some procedural changes should be made in this administrative area.

CONCLUSION: The single most significant improvement that can be made in the entire appeals process, in the judgment of the VFW, is to significantly reduce the total VA processing time. This would require analyzing in detail the regional and BVA appeals process to identify when, where, and why delays occur and take corrective systemic actions. We thought the Veterans Appeals Records Management System (VARMS) was to have addressed this problem a few years ago. Therefore, we strongly recommend VA give a very high priority to solving this problem in FY 1991. Veterans certainly deserve faster, more consistent service at the hands of the government when appealing an adverse decision.

This concludes our statement. It will be my pleasure to respond to any questions. Thank you.

STATEMENT OF PHILIP R. WILKERSON, ASSISTANT DIRECTOR
NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION
THE AMERICAN LEGION
BEFORE THE SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
COMMITTEE ON VETERANS AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
OCTOBER 4, 1990

Mr. Chairman and Members of the Subcommittee:

The American Legion appreciates the opportunity to offer comment on the current operations of the Board of Veterans Appeals with respect to staffing at the Board and the timeliness and quality of appellate actions, as well as the impact of the "Veterans' Judicial Review Act", P.L. 100-687.

In November 1988, the President signed into law the "Veterans' Judicial Review Act" which provided not only for the establishment of the U.S. Court of Veterans Appeals, but mandated a number of specific improvements in VA's due process procedures in benefit claims and in the operation of the Board of Veterans Appeals. The American Legion was pleased with the enactment of this legislation and is particularly proud that the Act contained a substantial number of provisions set forth in H.R. 5039, the "Veterans Reassurance Act of 1988", which was introduced in Congress on behalf of the Legion. This proposal sought to address many of the longstanding problems affecting full due process in VA's adjudication and appellate procedures.

We believe over the course of time, these and other changes provided for in this landmark legislation will have a beneficial and salutary effect on the manner in which veterans' claims for benefits are adjudicated. One of the provisions called for an entity similar to an Article I court, totally independent of the Department of Veterans Affairs, to review veterans cases denied by VA. The Court of Veterans Appeals, for the most part, embodies our philosophy that such a court should be free of political and budgetary constraints and not bound by VA's regulations, guidelines, or administrative determinations. We are pleased that the confirmation process has been completed on the seven judges who are to sit on this Court and action is underway to develop final rules of practice to replace the current interim rules.

Mr. Chairman, as you may know, The American Legion does not routinely represent in cases before the Court. We do, however, review all decisions rendered by the Board of Veterans Appeals in which The American Legion holds power of attorney. The organization reserves the right to challenge VA regulations and policies in specific cases through the Court. With advice of our Legal Counsel, veterans in a number of cases have been referred to attorneys currently practicing before the Court and our service officers stand ready to assist whomever a veteran may have chosen as their representative.

In the two years since its enactment, VA has proceeded to implement the provisions of P.L. 100-687 mandating additional due process procedures and notification to claimants in adjudication and appellate actions. More recently, P.L. 101-237 required VA to make correspondence and notices to claimants more informative and understandable. These requirements and related administrative actions have had and continue to have a direct and significant effect on the ability of current staffing at the regional offices and the Board of Appeals to handle the pending workloads in a timely manner.

Mr. Chairman, the issues of timeliness and quality in the processing of benefit claims by the regional offices were the subject of a hearing conducted by this Subcommittee in July of this year. Despite the steady increase in processing times caused by chronic staffing problems in the regional offices and the slow pace of ADP modernization, VA data indicates that over the past two years the number of days to complete development of an appeal at the regional office level have not increased as drastically. Between FY 1988 and today, the time from the receipt of the claimant's Notice of Disagreement (NOD) to the issuance of the Statement of the Case (SOC) has gone from an average of 56 to 61 days. The time from the Statement of the Case to receipt of the Substantive Appeal is 59 days and the elapsed time from the Substantive Appeal to Certification of the issues on appeal to the Board of Veterans Appeals has increased from 168 to 176 days. Obviously, there is room for improvement, which is basically dependent on resources.

Mr. Chairman, in the opinion of The American Legion, one of the recent major improvements in VA's due process procedures has been the Hearing Officer program. This initiative was implemented pursuant to the consent decree in the Semanchuk v. Walters case in 1988. It has been successful in providing those veterans seeking a personal hearing at the regional office an opportunity to appear in a timely manner before an impartial Hearing Officer who is empowered to take any adjudicative action to reverse, amend, or confirm the action of the local rating board. Previously, many claimants avoided a personal hearing at the regional office level and almost automatically sought recourse to the Board of Veterans Appeals. According to data on this program, the workload for the Hearing Officers has increased dramatically since its inception which has necessitated the addition of 10 Hearing Officers to the 40 originally assigned. The results over the last eighteen months indicate that many issues can be successfully and favorably resolved through the Hearing Officer. Alternatively, such hearings help ensure the inclusion of information and evidence the claimant deems important to the eventual consideration of the case by the Board of Veterans Appeals, and potentially the Court of Veterans Appeals.

With respect to actions on appeals by the Board, the percentage of cases in which one or more issues was allowed has remained at about 13.5 percent over the past three years. However, the percentage of appeals remanded back to the regional office for further development and consideration has steadily risen from 18.8 percent in FY 1986 to 23.6 percent as of the end of the third quarter of FY 1990. Remand actions generally involve additional evidentiary development, such as obtaining certain pertinent medical records or other information and the scheduling of a current physical or psychiatric examination. We believe the frequency with which cases are remanded reflects a concern by the Board with the lack of due process accorded and/or necessary development of cases by the regional offices. We further believe the remand rate highlights the continuing deterioration in the "quality" of adjudicative actions caused by inadequate staffing and insufficient training and the effects of an emphasis on productivity rather than the full and fair consideration of a veteran's claim.

The American Legion has over the last several years become increasingly concerned by the amount of time required by the Board to complete action on an appeal. Even before the enactment of P.L. 100-687 and judicial review, elapsed appeals processing time had begun to increase dramatically. According to data provided by the Board, in FY 1986 an average of 106 days was required. In FY 1987, this had jumped to 130 days and in FY 1988, it rose to 136 days. For FY 1989, the processing time was up to 167 days and as of the end of the third quarter of FY 1990, it was taking 192 days.

Although the number of cases received annually by the Board has risen by only 2,800 cases over the past three years, the number of pending appeals has increased dramatically by more than 7,500 since FY 1987. As of the end of the third quarter of FY 1990, there were 22,000 pending appeals.

The General Accounting Office (GAO) released a report in May 1990 highlighting the need for improved management within the Veterans Benefits Administration and Board of Veterans Appeals to enhance the timeliness of the appellate process. GAO's analysis described where certain avoidable delays were occurring and what steps VA could take to improve the overall processing time for appeals. In its response, VA indicated it was taking action to implement GAO's recommendations. This will involve initiatives to more effectively utilize and manage staffing and information resources both by the Veterans Benefits Administration and the Board.

While we feel this report and its recommendations will be helpful in addressing the longstanding problem of timeliness in appellate dispositions, we believe strongly that the continued absence of a permanent Chairman will seriously delay needed action at the Board. It has been almost two years since the enactment of P.L. 100-687 and an individual to serve as Chairman has yet to named and confirmed. Not only has there been a vacancy in the top leadership position, but there have been retirements and turnover among Board members, and no apparent action has been taken on appointments to these positions. Some senior attorneys and medical adviser physicians are serving as Acting Members. This situation has not only adversely affected the morale of Board personnel but productivity and the quality of many decisions. We believe there is an urgent need to resolve this problem.

Another issue which we feel may affect the quality of the Board's decisions is the cutback in the number of medical advisory staff. In the FY 1988 budget, there was provision for 6 FTEE medical advisers. In the FY 1989 budget, only 2 FTEE were included. Currently, there is one medical adviser and he is only on a part-time basis. Many of the cases coming before the Board involve complex medical questions as over three quarters of all appeals involve the issue of entitlement to service connection and increased evaluation of service-connected disabilities. With such minimum staff support, we feel the Board members may not have the necessary medical advice readily available to assist them in deciding these complex issues. Moreover, there appears to have been a significant decline in the use of Independent Medical Experts (IME's) as well as requests for opinions from the Armed Forces Institute of Pathology (AFIP) since FY 1986. Although the law now provides recourse to the Court of Veterans Appeals, we believe veterans should be confident that the Board will undertake any development necessary including advisory opinions to assure the fullest possible consideration of their appeal.

Despite the foregoing problems, the Board has in the last several months been able to make some improvements in productivity. The budget for the Board of Appeals for FY 1990 provided for total employment of 414 FTEE. This included 18 FTEE in the office of the Chairman, 63 Board Members comprising 21 sections, 138 FTEE attorney advisers, 2 FTEE medical advisers, and 185 FTEE in administrative support. At that employment level, the Board was projected to render 38,800 decisions with an estimated response time of 188 days from the receipt of the case at the Board to the release of the decision to the claimant. Through a variety of efforts, the Board has been able to complete by the end of August some 3,700 more decisions that initially planned for and estimates that by the end of FY 1990, 7,900 more cases will have been decided than originally projected.

The American Legion, however, remains concerned that some of this increased productivity may have come at the expense of quality in the appellate decision. We have found in a number of cases, in the interest of brevity in the decisional document, the section citing the evidence considered by the Board has been abbreviated and the Discussion and Evaluation and Findings of Fact sections may not fully reflect all of the pertinent information in the record. In addition, because of the shortage of Board members in various sections, some decisions contain only two signatures with an indication that the third member is temporarily absent. While this may be expedient for the Board and is authorized under 38 CFR 19.110, we do not believe the use of two member panels is in the best interest of the appellant. This particular issue was addressed in the proposed revision of the Rules of Practice of the Board of Veterans Appeals published in the Federal Register in August of 1989. The American Legion in its response to this notice expressed concern with the Board's current practice of using two member panels, since the intent of both the current and amended regulation is to maintain three member sections unless some overwhelming circumstance prevents a member from participating in a decision.

The FY 1991 budget request provides for an increase in staffing of 16 FTEE. There would be an additional 8 FTEE attorney advisers and 8 FTEE in administrative support. Based on the additional staffing and planned actions to reduce response time and increase productivity, it was estimated the Board would complete 45,150 appeals. The House Committee on Veterans Affairs, however, has recommended that a staffing increase of 60 FTEE is needed to meet the additional workload requirements associated with judicial review and to improve the timeliness in appellate dispositions. These plans, however, may be seriously jeopardized by the very real possibility of sequestration under Gramm-Rudman-Hollings, or other efforts to reduce government spending.

In conclusion Mr. Chairman, it is apparent from the data discussed today that there is an urgent need for additional staffing support at both the regional office level and at the Board to ensure appellants receive full due process and a full and fair decision on their appeals in a timely manner. We believe the provisions of P.L. 100-687, when fully implemented, will make VA's appellate process and procedures more responsive to the needs of veterans in seeking those benefits to which they believe they are entitled.

This concludes our statement.

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Statement of

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Before the

HOUSE VETERANS AFFAIRS SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE

on

OPERATIONS OF THE BOARD OF VETERANS APPEALS

OCTOBER 4, 1990

★ A not-for-profit national veterans' service organization ★

Mr. Chairman and members of the Subcommittee, the Vietnam Veterans of America, Inc. (VVA) appreciates the opportunity to present its views on the operations of the Board of Veterans Appeals (BVA). This oversight hearing is particularly relevant because it offers an opportunity to examine the BVA's operations in the context of the modifications that have occurred as the BVA has attempted to adjust to the Veterans Judicial Review Act. In addition, the failure to appoint a new chairman seems to have hindered operations during this crucial time.

As we stated in our testimony on June 14, 1989, we still have grave reservations about the wisdom and legality of recently enacted and currently proposed modifications to the rules of the BVA. In addition, we are concerned about the apparent abuse of the two member panel exception.

Amended BVA Rules Introduce New Obstacles to Veterans and Their Dependents Who Appeal a Denial of Benefits

When Congress passed the Veterans' Judicial Review Act (VJRA), thus creating the Court of Veterans Appeals (COVA), it did not intend to change the nonadversarial and informal nature of the VA appellate process. To the contrary, the legislative history of the Act indicates that Congress intended for the traditionally informal, pro-claimant adjudicatory and appellate processes to remain intact.

In final rules published May 15, 1990 (with a technical correction published on June 21, 1990), the Department of Veterans Affairs (VA) has implemented a time limitation for requesting a change in counsel, requesting a personal hearing, and submitting additional evidence at the Board of Veterans Appeals (BVA). This time limitation imposes a procedural burden and a practical limitation on advocacy before the BVA, thereby introducing more formality into the appellate process. On August 7, 1989, VVA provided commentary to the VA on the effects these new rules would have on the claims adjudication process. These comments are provided now at Attachment A.

The Rules and Their Impact

The amended rules constitute the first portion of a significant revision of appellate rules prompted by the passage of the VJRA. A larger portion of proposed rules was published, but has yet to be finalized. VVA also produced extensive comments which were submitted to the VA on October 2, 1989, in response to the publication of these proposed rules which are provided at Attachment B.

The amended rules finalized on May 15, 1990 provide that an appellant has 90 days within which to change counsel, submit additional evidence or request a personal hearing, absent a showing of "good cause" (*See* "The Showing of Good Cause," below). The 90-day period begins on the date notification is mailed informing the appellant that the case has been transferred to the BVA. No such deadline has ever existed before.

Limitation on Submitting Additional Evidence

The most significant aspect of the amendments is the imposition of the 90-day deadline for submitting additional evidence. Under the old rules, an appellant could continually improve the record to support his (or her) claim throughout the appellate process. The VA would keep the record open until the BVA rendered a decision, and if the appellant obtained important evidence supporting the claim – even at the last moment -- the VA would consider it. The impact of the amendments is to eliminate this favorable process.

The amendments dilute the right to a full *de novo* review mandated by the VJRA. (*See* 38 U.S.C. § 4004(a).) Ninety days does not always provide BVA counsel with an adequate opportunity to review a file, confer with the veteran and obtain evidence from VA hospitals, outpatient clinics and private treating physicians or experts. The ultimate effect of the amendment is the impairment of the appellant's ability to effectively build a proper record before the BVA.

The Showing of Good Cause

The amended rules provide that the VA will accept a request for a change in representation, a request for a personal hearing or to submit additional evidence after the 90-day deadline has expired, upon the showing of "good cause." The rules provide examples of good cause which include ("but are not limited to"): (1) illness of the appellant or the representative; (2) death of the representative; (3) withdrawal of the representative; (4) discovery of evidence not previously available; and (5) delay in transfer of the record to the BVA.

These examples indicate that it may be quite difficult to convince the VA that there is "good cause" to allow submission of additional evidence. Counsel for claimants will probably have to make a strong case in explaining why the evidence they wish to submit was not reasonably available for submission before the expiration of the 90-day period. Making a good record to support a good cause motion is also important because it may be possible to convince the Court of Veterans Appeals to overturn a BVA denial of the motion; but the Court is not likely to take this step if the facts and reasons submitted to support the motion are not convincing.

Although the VA asserts that the amended rules are necessary to reduce delays in decision-making, this very procedure, ironically, may cause delay in the processing of an appeal. Competent counsel will file a "good cause" motion for an appellant wishing to exercise the right to submit additional evidence, change counsel, or request a hearing. The result will be a rerouting of a record to a central decision-maker (the BVA Chairman) to review the record to make an informed and consistent determination of what constitutes "good cause."

Another fundamental problem with this procedure is that the determination of whether good cause exists is made *after* the 90-day deadline. During the notice and comment period, one commenter pointed out that an appellant or representative should be permitted to file a motion on or before the deadline to extend the time within which new evidence could be submitted, a hearing could be requested, or new counsel could be sought. The VA responded by stating that "[t]here would be little or no practical difference in the approach suggested."

This response is not accurate. The advantage of filing an early motion for extension of the 90-day period for submission of additional evidence is that it allows claimants and their representatives more effective planning of their presentation of the case. If this motion is denied prior to the 90-day period, the claimant will know that all he (or she) will have is 90 days to make an adequate record. If the claimant must wait until after the 90 days to have a motion for good cause decided, the claimant and his representative will be uncertain at the 90-day mark whether they will have an additional opportunity to submit evidence.

Where the VA Does Not Find Good Cause

In instances where good cause is not shown and the evidence or the request is referred back to the regional office, new rule 38 C.F.R. § 19.174(c)(1) provides for a potentially earlier effective date. That subsection states:

> If the Board denied a benefit sought in the pending appeal and any evidence so referred [back to the regional office] which was received prior to the date of the Board's decision, or testimony presented at a hearing resulting from a request for a hearing so referred, together with the evidence already of record, is subsequently found to be the basis of an allowance of that benefit, the effective date of the award will be the same as if the benefit had been granted by the Board as a result of the appeal which was pending at the time that the hearing request or additional evidence was received.

This amendment to § 19.174(c)(1) acknowledges that evidence which is submitted before a final decision and which the BVA refuses to consider should not have any impact on the effective date of an award of benefits, if granted.

Although this provision is intended to mitigate the negative effect of the new 90-day rule, claimants will still encounter problems when a motion for good cause to submit additional evidence is denied. First, the case will be delayed for a significant period of time. It may take two additional years for the BVA to decide the case after the claimant submits to the regional office the evidence the claimant wanted to submit to the BVA the first time around.

Second, claimants may be less successful before the regional office and the BVA on a reopened claim, as compared with the likelihood of success if the BVA waited for the additional evidence it refused to consider for lack of good cause. BVA decisions generally seem to be given a great deal of deference at regional offices. The inference is that the previous BVA decision is correct, and generally it is difficuit for an appellant to convince the regional office otherwise.

The Cause of Delays in the Appellate Process -- Appellant's Late Submission of Evidence or VA Inefficiency?

The VA indicated in its summary published with the amended rules that the purpose of the changes is "to ensure the timely processing of appeals." The VA's comments emphasized the importance of fixing the appellate record in light of judicial review under the VJRA. Continually throughout the summary, the VA stated that a primary purpose of imposing this limitation on appellants is to avoid delaying the appeal, which is a hardship on the appellant.

The informal and nonadversarial VA adjudication process, designed to assist claimants, is somewhat impeded by the new rules because they add a new twist to the appellate process: evidence submitted after the expiration of the 90-day period will not be considered by the BVA unless "good cause" is found.

The VA logically argues that claimants who submit evidence after the BVA begins to review an appeal delay BVA consideration of other appeals behind that of the claimant who submitted additional evidence. In essence, the BVA is saying that it is not fair for one veteran to delay the BVA's consideration of another veteran's claim. With the new rules, the BVA attempts to balance the interests of all appellants in having their claims efficiently processed against the interests of the individual appellant who, in the past, was able to take advantage of the traditional VA practice of allowing the submission of evidence at any time until a decision is rendered. However, when a claim is considered at the regional office, the VA uses the exact procedure that the new BVA rules are designed to prevent. At the regional office the claimant can submit additional evidence at any time in support of his claim.

The practical realities of the BVA appellate process indicate that its orderly nature will not likely be disrupted by the submission of additional evidence after the 90-day cutoff date. In point of fact, the BVA has lived without such a rule fcr decades. An average case remains in the custody of the BVA for about 165 days. One comment, submitted during the notice and comment period, observed that the BVA rarely performs substantial work on a case until the latter part of the time the case is at the BVA. The VA responded by stating:

> Often the reason that Board Sections cannot act until a case has been at the BVA for a considerable period of time is because of delays occasioned in getting the case to the Section in the first place, or removing it from the Section during earlier deliberation, because of long delayed action by an appellant or representative.

This statement does not effectively counter the argument against changing the rules which have been in force for decades. In addition, the amended rules are inconsistent with 38 C.F.R. § 3.103(a), which provides that it is the "obligation of the VA to assist a claimant in developing the facts pertinent to the claim . . . ."

The VA states that the submission of additional evidence late in the appeal leads to revision of decisions already promulgated and even to vacating decisions in some instances. (But if it takes a little longer to give a veteran what he is due, isn't that what the VA should do?)

The VA points to statistics to support its argument. The summary states that during fiscal year 1989, 73 decisions were vacated "primarily due to such problems." However, the VA fails to mention that 38,673 decisions were made that year. Thus, this number of vacated decisions constitutes a minuscule percentage (0.19%) of the total number of decisions promulgated.

Limitation on Changing Appellate Counsel

The amendment providing that an appellant may not change counsel after the 90-day deadline will likely have little practical effect. The new rule provides examples of "good cause," such as illness, death, or withdrawal of the representative. It seems that "good cause" could easily be shown for changing representatives after the 90-day cutoff date. The rule is silent about the appellant who has no counsel and decides at the last moment to select a representative. However, even in this instance, the appellant might argue that he (or she) is withdrawing as his (or her) own representative.

The rule is therefore essentially meaningless. It is adversarial in a sense, in that it imposes a procedural burden on a basic point in the process, but it has no practical impact. Again, if changing counsel results in the delay of the appeal, that is the appellant's choice to make.

Abuse of the Two Member Panel Exception

Concerned is justified at the apparent trend at the BVA for appeals to be reviewed and decided by only two Board members, rather than the full complement of three Board members. The VJRA provides for an exception to the requirement that decisions be rendered by three Board members. See 38 U.S.C. § 4002(a)(2) (1990). The clear intent of this provision is that it be an exception and not the norm. It is applicable when there is an "absence of a member" or a "vacancy on the Board" or when a member of an assigned section is "unable" to serve.

What we have seen over the past months is a regular pattern of two member Board decsions. The pattern appears established to the point where the BVA now has the two signature decisional document in pre-printed form as the last page of the BVA decision.

Two member BVA decisions dilute the claimant's right to have his or her appeal decided by a majority of a three person panel. Whatever potential for a more thoughtful consideration and debate of the merits of the appeal to be provided by the missing third member in these cases is lost. The claimant also is disadvantaged in those cases where the third member might not persuade his or her colleagues to decide the appeal a different way, but felt strongly enough to write a dissenting opinion. Dissenting opinions make reconsideration by an expanded panel of the BVA more likely and also increase the strength of any appeal to the U.S. Court of Veterans Appeals. Given the disadvantages represented by BVA decisions issued by two member Board sections, the BVA should be required to explain why so many Board members are "unavailable" to participate in regular three member Board decisions.

Conclusion

Prompted by the VJRA, the amended BVA regulations impose on claimants procedural burdens which were not contemplated by the Act. The rules, purportedly formulated to increase efficiency in the appellate process, are designed to assist the BVA in improving its own work performance statistics and actually create delays in the system.

In addition to their other adverse effects, these rules present particularly difficult hurdles for counsel handling only the appellate phase of a case. Such advocates are effectively prevented from improving the record without spending an additional year taking the claim through the entire adjudication process again.

In its attempt to balance the interests of the individual appellant with the interest of all appellants in the overall efficiency of the appellate process, the VA has placed increased importance on the record built at the regional office. As stated earlier, 90 days will not always be an adequate amount of time for an advocate to build a strong appellate record -- especially if the advocate is new to the case at the BVA level. This places a great deal of pressure on appellate counsel, particularly those who handle numerous cases simultaneously. Again, advocates should remember the importance of requesting a hearing when all necessary evidence cannot be obtained within the 90-day period.

ATTACHMENT A

National Veterans Legal Services Project Inc
2001 S Street NW
Washington DC 20009
202-265-8305

August 7, 1989

Secretary of Veterans Affairs (271A)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington DC 20420

Dear Secretary Derwinski:

The following comments are submitted on the proposed amendments to the Rules of Practice of the Board of Veterans Appeals ("BVA") which appear at 54 Fed. Reg. 28445-47, July 6, 1989.

These comments are submitted on behalf of the Vietnam Veterans of America, Inc. ("VVA"), and the National Veterans Legal Services Project ("NVLSP"). Both organizations provide representation to veterans and their dependents before the BVA. The representation is provided by staff attorneys, law students supervised by attorneys or law school clinical instructors, and non-attorney accredited service representatives ("SR").

GENERAL COMMENTS

The proposed rules are apparently part of a larger set of contemplated rules changes, the working draft for which was circulated on April 24, 1989, but which were not published for comment.

The proposed rules would establish cutoff dates after which an appellant could no longer submit additional evidence, request a change in SR, or request a personal hearing before the BVA, all absent a showing of "good cause." The proposed cutoff dates purport to assist the BVA in the deliberation process by 1) reducing "confusion" as to the exact nature of the appellate record, 2) "fixing" the appellate record to aid judicial review (Pub. L. 100-687), and 3) reducing delay by limiting the potential for removing the appellate record from those engaged in an "orderly appellate review." The articulated reason for the proposed rules is to:

> . . . assist in the orderly and prompt appeal processing and would help to clarify the nature and extent of evidence considered by the [BVA] in reaching a decision in any given appeal (p. 28446).

For decades, the BVA has operated under rules far different from those proposed. The BVA cites no evidence, and there is no evidence that the current policies that have been in existence for decades, do not provide for an "orderly appellate review."

The only intervening event cited in support of the need for this draconian set of proposed rules is the Veterans' Judicial Review Act ("VJRA"). This is ironic. The proposed rules do not further the objectives of the VJRA. Rather, they are a thinly veiled effort to make it as difficult as possible for a claimant to successfully seek court review. The proposed rules unduly restrict a claimant's ability to make a proper record before the BVA and to obtain the effective assistance of appellate counsel. Because during most, if not all of the 60-day period the record is not even in the hands of a BVA panel, the real objective of the proposed rules appears to be to change BVA review from a de novo proceeding to one in which the record is static. This plainly violates Title 38 U.S.C. 4004(a). It also appears that in some instances the proposed rules are likely to accomplish the opposite of what is intended.

The proposed cutoff date is set at 60 days after a notice of transfer of the record from a regional office ("VARO") to the BVA. The realities of the appellate process and the method by which most appellants are represented dictate establishing a much later cutoff date at which time an appellant can receive informed advice from his or her new appellate counsel. A more reasonable cutoff date would preserve the important statutory right to a full de novo review by the BVA and permit a meaningful review by the Court of Veterans Appeals ("CVA").

We propose a more reasonable means to attain the articulated goals and to protect the appellate rights of veterans and their dependents. Having the BVA determine after the cut-off date whether "good cause" exists is unreasonable. Instead, an appellant or appellate counsel should be permitted to file a motion on or before the cutoff date to extend the time within which new evidence could be submitted, a hearing could be requested, or new counsel could be sought.

Fixing the cutoff date at the point of transfer of the record from the VARO to the BVA denies appellate counsel an adequate opportunity to review the record and consult with the appellant. In most cases, the appellant lives far from the BVA where most appellate counsel have their offices. The cutoff date, if any, should be fixed at a specified period of time after the record actually arrives at the BVA; and in the case of new evidence, there should be no cutoff date and rarely should an appellant be forced to proceed with counsel not acceptable to him or her.

Additionally, there should be more guidance as to what constitutes good cause. The minimal language used does not offer any suggestion as to when the appellant can change counsel.

The proposed curative rule of permitting a change in the effective date upon a new decision after an initial denial of a request for a hearing, the submission of new evidence or the change of counsel does not adequately protect the due process and the statutory right to a meaningful BVA review and ignores the realities of the appellate process. Some of those practical realities are:

1. Many appellants are represented at the VARO by:

A. State agency employees holding a state agency or veterans organization power of attorney,

B. Legal Aid or private attorneys (which will increase with the advent of judicial review), or

C. Veterans organizations with limited BVA capacity.

2. Many claimants who appeal to the BVA are not satisfied with the counsel or organization that has represented them. (This is not meant to be critical of the work of any veterans' organizations but many any unsuccessful claimants tend to blame counsel and not any lack of merit to his or her own case. See also the discussion of neuropsyiatric cases below.)

3. In cases in which the organization representing the claimant uses a different counsel at the VARO and BVA levels, there is often little contact between VARO and BVA counsel.

4. There is a particular problem with neuropsychiatric cases when the claimant is difficult to communicate with or is otherwise hampered in his or her ability to assist counsel.

5. Many claimants are disadvantaged in the appellate process by one of a combination of:

A. Lack of sophistication in dealing long distance with counsel,

B. Inability to travel due to low income, disability or geographic isolation,

C. Lack of a telephone, or

D. The excessive numbers of misplaced claims files.

6. Transfer of the record from the VARO to the BVA is not always an orderly process due to:

A. Routing of a special interest case such as one with a Congressional inquiry,

B. Lack of timely notice to a claimant or the VARO counsel, especially when the VARO counsel does not maintain an office at the VARO (e.g., many VVA SRs, lawyers, and smaller veterans organizations).

C. Delay in transferring the record to the BVA SR or delay in assignment by a BVA service organization to one of its SRs, or

D. The delay of availability of a record at the BVA to BVA counsel if the case is routed to the Special Correspondence Section or a Board Section or if there is a problem in the BVA mailroom.

7. Quite often there is a no real opportunity for the BVA SR to establish a rapport with the claimant because the first real contact is usually the morning before the hearing.

8. The practice of "informal hearings" is often misleading to claimants. They are often under the impression that BVA counsel actually appears before a BVA panel and advocates on their behalf.

We are constrained to note that the procedure contemplated by the proposed rules will likely result in the disruption in the "orderly and prompt appeal processing" because any competent counsel will file a "good cause" application for an appellant wishing to exercise his or her right to a full de novo review, change counsel, or request a hearing. The result will be a rerouting of a record to a central decision-maker (the BVA Chairman) to review the record to make an informed and consistent determination of what constitutes good cause. It is also ironic that the proposed rules will likely result in fixing the appellate record as an incomplete record, a result clearly not contemplated by Congress.[1]

It is simply untrue that the orderly appellate process will be disrupted to schedule a hearing, allow new counsel (most of whom have offices at the BVA) to enter an appearance or add new evidence. Rarely is substantial work performed by the BVA on a case until the latter portion of the 180 days during which the average case remains in the custody of the BVA and the whole file need not be moved to act on a veteran's request for his or her basic statutory rights.

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[1] 38 USC 4004(a) was amended by the Veterans Judicial Review Act to read:

> **SEC. 203. DECISIONS OF THE BOARD.**
>
> (a) DECISIONS BASED ON THE RECORD.--Section 4004(a) is amended by adding at the end the following new sentences: "The Board shall decide any such appeal only after affording the claimant an opportunity for a hearing. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulations." (Emphasis added)

The purported curative rule (Section 19.174(c)(1)), permitting a potentially earlier effective date, unduly complicates and delays the appellate process and in reality makes a VARO very reluctant to "reverse" a previous BVA denial. The instincts of any normal agency of original jurisdiction are not to closely scrutinize a case already adversely de- cided by the appellate authority.

The proposed rules also place the claimant in an unlawful dilemma. He or she may be forced to take an inadequate record to the CVA or forego CVA review until the long road back to the VARO and the BVA is traveled. This delay is undue -- a result the proposed rules seeks to avoid -- but inevitably creates.

The proposed rules give an appellant sixty days to change counsel, request a hearing or supply new evidence while the case is in transit from the VARO to the BVA. Given the volume of cases at the BVA, it is unlikely that these requests can be orderly processed by linking the requests with the claims file as it slowly makes its way to the BVA and an assigned panel. Thus, the process is further complicated achieving a result sought to be avoided.

Another likely result of the proposed rules is that all VARO counsel will protect themselves by encouraging their clients to request a BVA hearing. If they cannot readily contact an appellant, the careful counsel would request a hearing. This may result in increased work for the BVA in scheduling hearings which do not materialize.

SECTION 19.174

A. Request For New Counsel

This proposed rule uses no previous or existing regulation as a basis and bears no relationship to the VJRA. In essence it is designed to prevent the withdrawal from a case by SRs and lawyers once an appeal has been certified to the BVA. As a practical matter, this proposed rule is unworkable since many veterans confer specific veterans service organizations with a power of attorney in their claims without ever notifying the veterans organizations. It is unethical to compel an attorney or SR to represent a client who does not desire to be represented by that person or organization.

It is the practice of the VVA and NVLSP to carefully screen the veterans it represents given their limited resources and the fact that the VVA and NVLSP have always used attorneys or closely supervised law clerks to represent the vast majority of its BVA appellants. Under the circumstances, it is improper for the BVA's rules to be configured in a way that compels the expenditure of scarce resources. This prospect is additionally improper because it vests effective decision-making authority with the BVA rather than with the representing organizations over who will and will not be represented.

As a practical matter, the 60-day period will likely expire before appellate counsel has had an opportunity to review the files and in the case of VVA, NVLSP or a private attorney, to evaluate whether they have anything to offer an appellant. To accept a case where the counsel cannot discern a credible argument may be unethical for an attorney. He or she is clearly obligated to inform the veteran of this dilemma and suggest a second opinion. Revealing to the BVA the conclusion that the case has no merit as a basis of showing "good cause", presents obvious problems.

The proposed rules do not articulate any meaningful reasons why entertaining a request for a change in counsel, even at the last moment, has any impact on the processing of the file. At some point, the request may be too late; but the BVA could not validly deny a request that simply stated "No effective client-counsel relationship can be established." This stock request may become common and the rule would therefore be meaningless. The BVA would also have a difficult time justifying a denial of a request for change of counsel when the appellant states that he or she just met the counsel the day of the hearing. The situation would be especially acute if the appellant disapproved of the tactics chosen by counsel or if the veteran asks the counsel to do something unethical.

In sum, the proposed rule denies the appellant the right to effective assistance of counsel. The proposed rule is silent about the appellant who has no counsel and decides at the last moment to select one. Further notice and an opportunity to comment in this regard is appropriate.

B. Hearings With Counsel And No Appellant

Current practice is to permit the appellant to utilize a long recognized effective appellate practice -- oral argument.

The proposed rules are not clear as to the nature of hearings when the appellant is not present. (The non-published "working draft" rules dealt with this issue explicitly.) Further notice and an opportunity for comment in this regard is appropriate.

Under the proposed rules when a hearing is scheduled and the veteran fails to appear, the BVA would apparently be permitted to treat the claim as if a hearing request had been withdrawn. The hearing would presumably be cancelled along with the veteran's right to a hearing even if his or her representative were present at the hearing and were prepared to make a presentation. This is especially unfair when technical legal arguments are at issue.

Once again, there is no apparent requirement for these rules stemming from the VJRA. Instead, they appear ill-conceived and punitive.

C. New Evidence

The proposed rules are unclear if an appellant who has timely made a request for a hearing can submit new evidence beyond the 60 day cutoff date. To permit the rejection of new evidence would dilute the right to a full de novo review mandated by the VJRA. BVA counsel would likely never have had an opportunity within the 60 day period to adequately review a file, confer with the veteran and obtain evidence from VA hospitals, outpatient clinics and private treating physicians or experts. Evidence of continuing treatment up to the date of the hearing would be rejected even though it was obviously very relevant. The record for CVA review would thus not be adequate.

The rule should be to permit new evidence to permit a full de novo review unless there was a deliberate flaunting of the appellate process. This is the practice of the Discharge Review Boards and Boards for Correction of Military Records. The BVA should not adopt a rule at odds with the will of Congress and the practical realities of the BVA appellate process.

D. Request For A Hearing

The 60 day cutoff rule is unrealistic in light of the clear practical aspects of the BVA appellate process discussed above. The result will be that hearings are requested in all cases when many appellants could be properly advised, after a meaningful review of the case and conference with the appellant, that the expense of travel to a hearing and the emotional cost involved would be outweighed by the likely predictable outcome of the appeal.

In sum, the proposed rule is unfair to appellants and counsel, does not accomplish the articulated goals of the rulemaking, and denies an appellant the due process right to the effective assistance of appellate counsel.

Respectfully submitted,

David F. Addlestone

Barton F. Stichman

Michael E. Wildhaber

Attachment B

National Veterans Legal Services Project Inc
2001 S Street NW
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HAND-DELIVERED

October 2, 1989

Secretary of Veterans Affairs (271A)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington DC 20420

Dear Secretary Derwinski.

The following comments are submitted on the proposed amendments to the Rules of Practice of the Board of Veterans Appeals ("BVA") which appear at 54 Fed. Reg. 34334, August 18, 1989. We received an extension of time within which to submit these comments until October 2, 1989.

These comments are submitted on behalf of the Vietnam Veterans of America, Inc. ("VVA") and the National Veterans Legal Services Project ("NVLSP"). VVA is a Congressionally-chartered veterans service organization with 35,000 members. Many of its members have claims for benefits pending at the BVA. Both organizations provide representation to veterans and their dependents before the BVA. The representation is provided by staff attorneys, law students supervised by attorneys or law school clinical instructors, and non-attorney accredited service representatives ("SRs").

Some of our comments on the proposed rules suggest amendments which would improve the rules. Other comments urge that the proposed rule not be adopted in any form.

GENERAL COMMENTS

The statement preceding the proposed rules states that they are designed to "accommodate" the changes imposed by the Veterans Judicial Review Act (VJRA). These changes are described as the establishment of judicial review by the Court of Veterans Appeals (CVA) and the "involvement of private attorneys-at-law in the appeals process at the Department level."

In fact, many of the proposed rules do not facilitate judicial review or attorney representation at the Department level. Instead, they are a thinly veiled effort to make it as difficult as possible for a claimant to successfully seek BVA review of a Department of Veterans Affairs Regional Office (VARO) decision or CVA review of a BVA decision. The proposed rules unduly and unlawfully restrict a claimant's ability to make a proper record before the BVA and to obtain the effective assistance of counsel. In many respects, these proposed rules violate the VJRA itself.

Among the most objectional aspects of the proposed rules are:

1. The proposals create needless procedural hurdles for claimants and their representatives by making them use precise language in the forms they file. This emphasis on technical "pleading" requirements unduly legalizes what Congress intended to be an informal process and discriminates against SRs, who are, for the most part, non-lawyers and not trained in legal pleading.

2. By severely restricting the right to submit evidence, change counsel or request a hearing at the BVA level, the proposed rules act to transform what Congress intended to be a de novo proceeding to a proceeding approaching an appellate review of a static factual record.

3. The proposals reflect an unwarranted hostility towards paraprofessionals and towards written and oral advocacy aimed at persuading the VA to grant the benefits sought.

4. The proposals transfer power to the BVA Chairman by reducing the discretion and independence of Board members. This is in direct violation of the VJRA's goal of making Board members more independent of the Chairman.

SPECIFIC COMMENTS

A. Unwarranted Procedural Requirements for Claimants and Their Representatives

SECTION 20.201: Notice of Disagreement

38 CFR § 19.118 currently states:

> A written communication from a claimant or the representative expressing dissatisfaction or disagreement with an adjudicative determination of an agency of original jurisdiction. . . will constitute a notice of disagreement. The notice of disagreement should be in terms which can be reasonably construed as a desire for review of that determination. It need not be expressed in any special wording.

The VJRA neither amends the statutory provisions regarding the Notice of Disagreement (NOD), nor requires any amendment to the regulation quoted above. In addition, the language and legislative history of the VJRA demonstrate that Congress did not intend the VJRA to disadvantage claimants and wanted the VA to keep the same informal, pro-claimant adjudicatory process it had been using in the past. Written communications have always been liberally viewed as NODs by the VA whenever any disagreement or dissatisfaction has been expressed by the claimant. The VA cannot validly change this long-standing pro-claimant policy.

In addition to violating the VJRA, this proposed rule would be unsound policy. GAO Report HRD-89-24, issued June 1989, *Veterans' Benefits: Improvements Needed in Processing Disability Claims* concludes that the notice of a VARO decision sent to claimants was "not clear" in 63% of all compensation claims studied. It is not fair to claimants to require them to use technical or precise language to respond to notices that are not clear in the first place.

This proposed rule violates this policy in the following respects:

* § 20.201 adds a provision stating that a "NOD *must* be in terms which can reasonably construed as disagreement and a desire for review" of the decision [emphasis added]. The current regulation simply states that the NOD "should be in terms. . . ." Thus, the proposal unlawfully changes precatory language to mandatory language and unlawfully adds as a mandatory requirement the expression of a "desire for review."

* § 20.201 adds the requirement that a claimant must now formally articulate in writing which determinations (s)he disagrees with when the VARO gives notice that it made adjudicative determinations on several issues at the same time. The current regulation has no such requirement. The VA's current policy is simply to interpret a NOD that does specify issues as one which contests all the issues adjudicated. There is nothing wrong with urging claimants to identify the issues on which there is disagreement. It is unlawful, however, to make this a prerequisite to a valid NOD.

* § 20.201 places unnecessary hurdles in the way of claimants attempting to appeal VARO denials. Many claimants lack representation at this early stage of their claim, and many are mentally disabled. Many such claimants are not capable of complying with the overly legalistic and technical requirements of this proposed rule.

SECTION 20.202: Substantive Appeal

The language and legislative history of the VJRA demonstrate that Congress did not intend the VJRA to disadvantage claimants and wanted the VA to keep the same informal, pro-claimant adjudicatory process it had been using in the past. This intent is evident, for example, in Section 206(b) of the VJRA, which amended 38 U.S.C. § 4005(d)(4) to add that, "The claimant may not be presumed to agree with any statement of fact contained in the statement of the case to which the claimant does not specifically express agreement." [emphasis added] By adding the word "not," Congress intended to make the Substantive Appeal less technical and difficult for claimants to file.

Proposed § 20.202 clearly violates this Congressional intent. Instead, it makes filing the Substantive Appeal more difficult for claimants by adding highly legalistic, technical requirements.

This proposed rule violates 38 U.S.C. § 4005 and the VJRA in the following respects:

> * § 20.202 adds a provision that if the Statement of the Case (SOC) addresses several issues, the Substantive Appeal must indicate that the appeal is being perfected as to all those issues or must identify the particular issues appealed. The statute and the current regulations have no such requirement. The proposed rule should be changed to provide that if the issues on appeal are not identified, the Board shall treat the appeal as if all issues are being appealed.
>
> * § 20.202 also requires that specific arguments "must" be set out in the Substantive Appeal. The current regulation uses the precatory language "should," as does the statute. See 38 U.S.C. § 4005(d)(3). The change to a mandatory requirement is unlawful. In addition, it defies common sense. If the claimant's brief, filed subsequent to the Substantive Appeal, sets forth specific arguments, there is no valid reason the appeal should be dismissed because of the wording in form 1-9. Similarly, there is no sound reason why there must be "argument" laid out at all at this stage if a BVA hearing is subsequently requested or the representative subsequently submits VA Form 646, and the alleged errors of fact or law are identified at this later stage.

- § 20.202 places unnecessary hurdles in the way of claimants attempting to appeal VARO denials. Many claimants lack representation at this stage of their claim, and many are mentally disabled. Many claimants will be unable to meet the overly legalistic, technical wording requirements of this proposed rule.

SECTION 20.607: Power of Attorney

This proposed rule restates existing regulations giving the claimant the right to revoke his representative's Power of Attorney (POA) "at any time." We support this proposed rule, but note that it is in direct conflict with the ill-advised proposed rule, in § 20.1304, which allows a claimant to change POA only within 60 days of his being notified that his case has been transferred to BVA, unless "good cause" is shown.

SECTION 20.608: Deadline for Withdrawal by Claimant's Representative

This proposed rule concerns the withdrawal by a representative from a case which is at the Board of Veterans Appeals. Current regulations place no restrictions on a representative's right to withdraw from a case. Under current BVA practice, when a representative withdraws from a case, the BVA writes the claimant advising him of this, and simply offers to reschedule the hearing if one has been set.

This proposed rule would prohibit such a withdrawal except upon a showing of "good cause" by the representative. Whether good cause has been shown would be determined by the Chairman.

The proposed rule places unwarranted burdens upon the representative in several ways. First, a representative could be compelled to represent a claimant whom he has never agreed to represent. This could occur because current VA practice is to permit a claimant to file a VA Form 23-22 designating a particular VSO, without getting prior agreement from the VSO.

In addition to compelling representation, against the representative's will, the proposed rule would violate the Code of Professional Responsibility. The rule defines good cause as illness of the representative, failure of the claimant to cooperate with the representative, "or other factors which make continued representation impractical or impossible."

If such a rule must be adopted, it should contain several more provisions. It should grant an exception for those cases where a representative has not been consulted prior to being selected by the claimant. The word "unethical" should also be added to "impractical" and "impossible" to accomodate the Code of Professional Responsibility. Moreover, a representative should not be required to explain how or why his continued representation would be unethical. These additions would make the proposed rule more fair to representatives, and would not harm the rights of claimants.

SECTIONS 20.800, 20.1304: New 60-Day BVA Deadlines

This rule governs submission of additional evidence, change in representative and request for hearing following certification to the BVA. We commented extensively on these provisions in our August 7, 1989 comments submitted to the VA, and we incorporate those comments herein by reference. A further explanation why these rules are unlawful and unwise are contained in the Declaration of Michael Wildhaber, attached hereto as Attachment A.

B. Rules Reflecting Hostility Towards Paraprofessionals and Oral and Written Argument

SECTION 19.31: Supplemental Statement of the Case

This section provides that a Supplemental Statement of the Case ("SSOC") may not be required following development on remand where the only purpose is to assemble records previously considered by the VARO and already discussed. Under the rule a SSOC will also not be required if the Board so specifies. Finally, a SSOC will be required following a hearing before VARO personnel when new evidence is presented, but not if only argument is presented.

It is this last provision which we find objectionable. This provision reflects an unwarranted and unfounded hostility toward oral and written argument. The implication of the provision is that a claimant's arguments are less important, and less deserving of the VARO's response, than is the submission of evidence. In fact, it is usually helpful to the BVA to know how VARO analyzed the arguments presented to it.

SECTION 20.606: New Restrictions on Legal Interns

The rules covering legal interns, law students, and paralegals has been completely rewritten by this proposed rule. Subsection (e) concerns the withdrawal of permission for legal interns, law students and paralegals to assist in the appeal. Permission may be withdrawn by the Chairman "at any time for lack of competence, unprofessional conduct or interference with the process."

Section 20.606(e) unlawfully singles out legal interns, law students and paralegals for an entirely new and separate discipline system for such representatives. All other advocates have a separate system with adequate substantive and procedural requirements administered by the General Counsel of the VA. See

38 C.F.R. §14.633(c) (1988).

Legal interns, law students, and paralegals have a long history of effective representation of claimants before the Board. There is no rational basis for this rule's discrimination against them and against claimants who choose to be represented through these advocates. In this regard, VVA and NVLSP incorporate by reference herein the comments submitted on September 15, 1989 by the Public Interest Law Clinic of the Washington College of Law at American University. In the alternative that the Chairman of the BVA is authorized to bar representation by these advocates, substantive and procedural guidelines like those in 38 C.F.R. §14.633(c) (1988) must be included. The substantive criteria in proposed §20.606(e) are exceedingly vague.

SECTION 20.700: Denial of the Right to a BVA Hearing

Subsections (a) and (b) of this proposed rule state that a hearing may not normally be held solely for the purpose of receiving argument by the representative. Oral argument may be submitted on audio cassette to be transcribed for the record. A representative may appear alone to present argument, but must make a request to do so, showing good cause. The presiding member determines whether good cause has been shown.

This proposed rule is both unwise and illegal. An oral presentation by an advocate explaining why the law and evidence should result in the grant of the claim, and providing the Board with an opportunity to engage in a give-and-take discussion of issues that are troubling members of the Board or on which a member has questions, is an important part of the constitutional right to an opportunity to be heard. An example of a hearing in which an oral presentation by the advocate assisted both the claimant and the Board is attached hereto as Attachment B (ironically, the Chairman of the Section began the proceeding by questioning the need for a hearing in the absence of the claimant).

By denying to those claimants who are unable to attend a hearing the right to have the advocate make an oral presentation, but allowing this right to claimants who are able to attend a hearing, the proposed rule also violates the constitutional rights of the former group to equal protection of the laws. Many claimants are indigent, have employment or family obligations, or have service connected disabilities, which prevent them from attending a BVA hearing, even a BVA traveling panel hearing, which may be hundreds of miles from the claimant's home.

This proposed rules also contradicts 20.600 of the proposed rules, which states that "An appellant will be accorded a full right to representation in all stages of an appeal..." (38 CFR Sec. 3.103). Finally, the rule violates 38 U.S.C. §4004(a) as amended by VJRA Sec. 203(a), which states that, "The Board shall decide any such appeals only after affording the claimant an opportunity for a hearing." Neither 38 U.S.C. §4004 nor any other provision of the law requires that the claimant attend a BVA hearing as a prerequisite to the right to a hearing.

SECTIONS 20.702(d) and 20.704: Denial of the Right to a BVA Hearing

This subsection states that when the claimant fails to appear at his BVA hearing, the case will be processed as though the hearing request was withdrawn. No hearing will be rescheduled unless good cause is shown for the failure to appear and a timely request for postponement was not possible.

As discussed in the comments above to proposed §20.700, if a claimant fails to appear, but the representative is there and ready to proceed, the representative should have the right to have the hearing go forward. To do otherwise is to deny the claimant the right to a hearing and to representation at all stages of the appellate process.

SECTION 20.1003: Denial of the Right to a BVA Hearing

This proposed rule prohibits a representative from appearing without the claimant for a hearing on reconsideration. The comment for the last proposed rule applies with even greater force to this proposal. To deny a hearing to an advocate in a reconsideration case, where the issue is usually limited to the existence of an "obvious error of fact or law," makes little or no sense. This is essentially a legal issue, and the advocate usually has more to offer than the claimant/witness.

C. Rules Giving the BVA Chairman Undue Authority

SECTION 19.3(d): Removal of BVA Members for Punitive Reasons

Subsection (d) allows the Chairman to assign or substitute additional Board members to a section to fill a vacancy in the section or to permit the section to hear an appeal "without any additional assignment or substitution of members." The pluralizing of the word "member" in that sentence implies that only one section member can hear and decide an appeal. This implication should be removed because there is no authority for this change in the VJRA and it violates 38 U.S.C. §§4002 and 4003, which provide that a minimum of two section members must hear an appeal.

Subsection (d) is also inconsistent with Sec. 208 of the VJRA, which permits such substitutions only when there is an "absence of a member or a vacancy on the Board or inability of a member to... serve on that section." The proposed rule allows for substitutions when "as a result of a vacancy, absence, or other good cause, a Member is unable to participate effectively." (emphasis added) By adding the power to substitute for a member who, in the Chairman's opinion, "is unable to participate effectively," but who is nonetheless able to serve on the BVA section within the meaning of Section 208 of the VJRA, the proposed rule is in excess of statutory authority and violates claimants' rights to a decision by an unbiased BVA panel.

SECTION 19.6: Removal of BVA Members for Punitive Reasons

This section provides that when a vacancy occurs on a Board section after a personal hearing, the Chairman may designate a substitute member to take part in the decision, although the substitute has not heard the appellant testify or the representative present oral argument. The proposed rule adds the provision that the substitute may be appointed when a member present at the hearing is "unable to participate" in the final decision. This last phrase should be deleted as only "absence" or "vacancy" can suffice as a reason for substitution consistent with 38 U.S.C. §4002(a)(2)(A).

SECTION 19.12(c): Removal of BVA Members for Punitive Reasons

Subsection (c) allows the Chairman to disqualify members of the Board where there is potential bias, where the member made the decision on administrative appeal or where a member is determined by the Chairman to be "unable or unwilling to act."

The VJRA and its legislative history demonstrate that Congress intended to limit the power of the Chairman vis a vis Board members by increasing their judicial independence. This proposed rule should be eliminated since it is ultra vires the statutory powers of the Chairman. Neither 38 U.S.C. §4002 or §4006 authorize this rule, and it invites abuses of power.

SECTION 20.2: Chairman to Determine the Outcome of BVA Cases

This proposed rule amends existing regulations to provide that the Chairman, rather than the Chief Board member, may prescribe a procedure in the absence of any applicable rule or procedure. None of the laws cited by the proposed rule give authority for this change. The VJRA and its legislative history demonstrate that Congress intended to limit the power of the Chairman vis a vis Board members by increasing their judicial independence. This proposed rule violates the intent of the VJRA in that it adds the Chairman as a decision-maker above the Board sections. In addition, the rule is inefficient since the Board sections will be forced to delay their processing of a case while it is routed through the Chairman's office.

D. Other Rules

SECTION 20.711: Subpoenas

This proposed rule concerns the availability of subpoenas to compel the attendance of witnesses and the production of tangible evidence. Such witness may be compelled to appear if they reside within 100 miles of the hearing. The decision to grant or deny the motion for a subpoena is made by the Chairman or the VARO director (when the hearing is to be conducted in the field). A denial by a VARO director is appealable to the BVA. A motion to quash may be filed with the person who issued the subpoena, and the VA's decision on that motion is not appealable. This last provision, making the motion to quash not subject to appeal, violates 38 U.S.C. §4004, which states that, "All questions on claims involving benefits under the laws administered by the Veterans Administration" are appealable to the BVA and CVA. The proposal should be amended to provide that such decisions are appealable.

The proposed rule also violates 38 U.S.C. §3311 by eliminating subpoenas "to take affidavits [and] to administer oath and affirmations" for the purpose of "making" investigations and examin[ing] witnesses upon any matter within the jurisdiction of the [VA]." This right to depose witnesses prior to a hearing (or in a case where no hearing is held) is very important to a claimants' ability to present his or her case.

The proposed rules also violates 38 U.S.C. §3311 by restricting the circumstances for issuance of a subpoena to "[w]hen necessary evidence can not be obtained in any other reasonable way." Section 3311 provides that subpoenas are to "aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the [VA]." The proposed rule clearly violates this statutory language.

SECTION 19.5: CVA Decisions Not Binding Precedent on BVA

This section states that the BVA is bound by applicable statutes, VA regulations and opinions of the VA General Counsel. This section fails to state that under the VJRA the BVA is also bound by decisions of the Court of Veterans Appeals. This section should be revised to add such a provision.

SECTION 20.101: CVA Decisions Not Binding Precedent on BVA

Like proposed section 19.5, subsection (a) states that the BVA is bound by applicable statutes, VA regulations and opinions of the VA General Counsel. This section similarly fails to state that under the VJRA, the BVA is also bound by decisions of the CVA. This section should be revised to add such a provision.

Subsection (c) states that only the BVA will make final decisions as to its jurisdiction. This proclamation might mislead readers to believe that it limits the authority of the CVA to review all BVA decisions. This provision should be clarified to avoid such a conflict.

SECTION 20.1303: CVA Decisions Not Binding Precedent on BVA

This proposed rule eliminates the regulation which states that the Board will strive for consistency in issuing its decisions. Removing the consistency provision is contrary to due process, as well as the VJRA and the establishment of the Court of Veterans Appeals. The Board should be attempting to achieve more consistent opinions, especially in light of the creation of the CVA, by using BVA decisions as precedential guides.

SECTION 19.11: Travel Panel Specialists

This section deals with BVA reconsideration panels. Subsection (c) of this section provides that in traveling panel reconsiderations, appeals concerning radiation, Agent Orange or asbestos issues will require a traveling member specializing in these areas. This provision could be strengthened by adding other issues which also require expertise. These other issues include post traumatic stress disorder and complex medical causation issues such as the dates of inception of a veteran's cancer or other disease.

SECTIONS 19.30 and 19.36: Copies of DVA Correspondence

These proposals calls for a copy of the Statement of the Case and notification of certification of an appeal to be sent to the claimant's representative. We urge that VA amend this rule to specify that the representative's copy be sent by mail not just to a drop-box at the VARO or to the VSO national office as is done by many VAROs. This type of drop-box service is not effective.

SECTION 20.3: Definition of Law Clerk

Subsection (j) of this section defines "legal intern" as a law school graduate who has not yet been admitted to a state bar. This definition is quite different from that commonly used in the legal profession, which defines a legal intern as a law student, and uses the term "law clerk" to describe one who has graduated, but not yet been admitted to a bar. This proposed rule creates confusion and should be amended to make this correction.

SECTION 2.609: Limit on Attorney's Fees

In subsection (e), the delay in payment and the contingent nature of the representation should be added as factors to consider.

Subsection (f) states that attorney fees of "no more than 20 percent of any past-due benefits awarded... will be presumed to be reasonable." This should be clarified so that it is not construed to mean that fees over 20 percent will be presumed unreasonable, which would be ultra vires the VJRA.

Subsection (i) violates Sec. 104(a)(2) of the VJRA which provides that fee agreements may be reviewed by "the Board." Subsection (i) replaces Board with "Chairman," thus attempting to vest him with powers not intended by Congress. Moreover, a policy standpoint, Board members are in the best position to judge the quality and quantity of an attorney's work on a case.

SECTION 20.714: BVA Hearing Transcripts

Under this proposed rule, a transcript of a hearing at the BVA will not be prepared unless:

(1) the issue is remanded;

(2) the appellant has shown good cause why a written transcript should be prepared; or

(3) the BVA decision on an issue addressed at the hearing has been appealed to the CVA.

The problem with this rule is that a hearing transcript may be very important to a representative or claimant in deciding whether to appeal to the CVA. "Good cause" should be defined in the rule specifically to include the situation when the claimant or the representative wish to examine the transcript in order to assess whether to appeal. The cost of preparing a transcript upon request of the claimant or representative is outweighed by their need to make an intelligent decision on whether to appeal to the CVA.

Sincerely,

Barton F. Stichman
Michael E. Wildhaber
William F. Russo

ATTACHMENT A

DECLARATION OF MICHAEL E. WILDHABER

Now comes Michael E. Wildhaber, being duly sworn, and states as follows:

1. I am a graduate of Antioch School of Law (J.D., 1985) and a member of the Pennsylvania and District of Columbia Bars. Since 1985, I have been a staff attorney with the National Veterans Legal Services Project (NVLSP). NVLSP operates the legal services program of Vietnam Veterans of America (VVA), a Congressionally chartered veterans service organization (VSO). Since 1985, I have been an accredited service representative of VVA and have regularly represented claimants before the Board of Veterans Appeals (BVA).

2. VVA's legal services program involves the use of staff attorneys, staff law interns and volunteer private bar attorneys for representing claimants before the BVA. Since 1987, I have been the supervisor of VVA's legal services representation program before the BVA. In this position, I supervise the preparation and presentation of all appeals litigated by VVA's legal services program before the BVA. I have presented myself or supervised the presentation of over 100 appeals to the BVA.

3. Based on my experience with the BVA, it usually takes at least one month, and often longer for a claimant's VA case file to arrive at the BVA after being certified for appeal by the VA Regional Office (VARO).

4. The large majority of the claimants who appeal to the BVA are represented by a recognized veterans service organization (VSO). In almost every instance, the claimant designates a VSO as his or her representative by naming that organization on a VA Form

23-22 (a copy of which is attached hereto as Exhibit 1). That form lists, on the back, all recognized VSOs, and the claimant can select any VSO that claimant wishes.

5. After a VSO is designated by a claimant on the VA Form 23-22, the VA notifies the VSO of the designation, and the VSO usually assigns the claimant's case to an accredited service representative (SR) who works for that VSO. If the record of the case has not yet been transferred to the BVA, the SR to whom the VSO assigns the case is one who works at or near the VARO which has jurisdiction over the case. If the record has already been transferred to the BVA, the SR to whom the VSO assigns the case is one who regularly presents appeals before the BVA in Washington, D.C.

6. The current practice of the BVA in processing appeals, which, to my knowledge, has existed without change for numerous years, is as follows:

(a) when the case is ready to be forwarded to the BVA in Washington, D.C., the claimant and his or her SR at the VA Regional Office level are mailed a letter notifying them that the record is about to be forwarded to the BVA. Examples of these letters are attached hereto as Exhibits 2, 4 and 6.

(b) on an average of five to six weeks later, BVA administrative personnel inform the VSO designated by the claimant that the record is now available at the BVA, that the VSO may review the record at the BVA, and that the VSO has 60 days within which to review the record, to submit evidence not already a part of the record, or to request a hearing in a case in which the claimant has not previously requested a BVA hearing. Examples of letters from the BVA administrative personnel so notifying a VSO are attached hereto as Exhibits 3, 5 and 7.

7. The VSO, in almost every instance, assigns the appeal after receiving the notice described in paragraph 6(b) above to a SR who regularly presents appeals at the BVA and who has not previously represented the claimant. Even when the claimant does not change the designated VSO upon appeal to the BVA, the SR who represents the claimant at the BVA will, in almost every instance, be a different person than the SR who represented the claimant at the VA Regional Office before the record was transferred to the BVA.

8. When the VVA receives the notice described in paragraph 6(b) above, its policy is to review the record at the BVA and to then consult directly with the claimant about the case in order to decide whether to present additional evidence, and if so, what evidence should be developed and obtained, whether to request a BVA hearing, and whether VVA can provide effective representation in the appeal consistent with the Code of Professional Responsibility. It often takes a great deal of time to gather the information necessary to make these decisions for a variety of reasons. For example, sometimes VVA first discovers the claimant has selected VVA as the VSO on appeal when VVA receives the notice described in paragraph 6(b) above, and the claimant is not easy to consult with because he or she does not have a telephone. Sometimes, it takes

many weeks to investigate and obtain evidence that will provide additional support for the claimant's appeal. Investigating and obtaining evidence is especially time-consuming and critical in cases in which the claimant switches the designated VSO to VVA, or has not been represented by a VSO before and first selects VVA when the case is in the process of being transferred to the BVA. Sometimes, in a case in which VVA advises the claimant that a personal BVA hearing is advisable, it takes many weeks for the claimant to determine whether he or she can obtain the financial resources and set aside the time necessary to travel to Washington, D.C. for the hearing.

9. For numerous reasons, including those discussed above in paragraph 8, in a high percentage of the appeals in which VVA is the designated VSO, VVA exercises its right, referred to in Exhibits 3, 5 and 7, to request an extension of the 60-day time period within which to submit additional evidence or request a hearing. For many years, the practice and policy of the BVA has been and still is to be very liberal in granting requests for extensions of the 60-day time period. VVA regularly requests, either orally, or in writing, extensions without advancing the specific reasons for which an extension is necessary, and, based simply on the fact that an extension has been requested, the BVA has granted the extension. To my knowledge, the BVA has never denied a VVA request for an extension of the 60-day time period.

10. Proposed Rule of Practice 1304 (Sec. 20.1304) would severely disadvantage VVA members and hinder the ability of NVLSP

to represent its clients effectively at the BVA in that

(a) by starting the 60-day time period within which a claimant can submit evidence, change representatives or request a hearing, at the time the record is ready to be transferred from the VARO to the BVA, instead of the point at which the record is available at the BVA, the proposed rule effectively eliminates access to the record on appeal for five to six weeks;

(b) instead of allowing requests for extensions of time to be submitted prior to expiration of the 60-day period (and thereby giving claimants advance notice when an extension will not be allowed so that the claimant and representative can plan accordingly), the proposal does not allow claimants advance notice whether an extension will be allowed. Under the proposal, the penalty imposed for an extension that is not allowed is severe: transfer of the case back to the VARO for a new VARO decision and statement of the case, thereby delaying the case for at least one year before it can be decided by the BVA;

(c) the "good cause" grounds for which an extension will be granted under the proposed rule are much more restrictive than the routine grant-of-extension policy under which the BVA has operated for years.

11. I declare and state under penalty of perjury that the information set forth herein is true and correct.

October 2, 1989 M E Wildhaber

DATE MICHAEL E. WILDHABER

ATTACHMENT B

Veterans Administration

TRANSCRIPT OF HEARING

BEFORE

BOARD OF VETERANS APPEALS

WASHINGTON, D C. 20420

IN THE APPEAL OF : [redacted]

DOCKET NO. :

DATE : August 10, 1989

REPRESENTED BY : Ms. Elizabeth Sandrin,
Vietnam Veterans of America

MEMBERS OF BOARD : Mr. Clifford J. Sturek, Chairman
Dr. Jerome Imburg
Mr. J. Michael Johnson

WITNESSES : Mark Venuti, VVA, Observer

VA FORM 1 4098, APR 1980

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[redacted]

CHAIRMAN: This is a hearing before the Board of Veterans Appeals sitting in Washington, D.C., in the appeal of [redacted] His claim number is 26 472 428. Mr. [redacted] however, is not present. He is represented at this hearing by Elizabeth Sandrin of the Vietnam Veterans of America. Also present in the room is Mark Venuti from the same organization. The issue that has been certified for appellate review is entitlement to an increased rating for paranoid-type schizophrenia for which a 70 percent rating is currently assigned. I note for the record that the veteran had been assigned a 100 percent rating effective from in March 1974, had been considered incompetent from January 1975 but a 70 percent rating on a schedular basis has been assigned since September 1984. There have been a number of occasions when a temporary total rating based on hospitalization has been assigned. With that, Ms. Sandrin please proceed.

MS. SANDRIN: Good morning. Thank you members of the Board for allowing us to present argument before you this morning. As just stated, the issue is entitlement to an increased evaluation, or an increased rating for Mr. [redacted] service-connected psychiatric disorder. I have filed a brief which is before you this morning and I don't plan on reading from the brief, I would just like to highlight some of the main arguments in support of Mr. [redacted] claim. This brief does spell out in further detail though these arguments.

Before I begin the arguments though, I would just like to go over the relevant facts of Mr. [redacted] case.

[redacted] entered the Marine Corps on May 8, 1968. He was assigned to the Motor Transport Services Unit which was responsible for bringing supplies to the Marines on the front line. Because of the nature of this duty assignment he experienced a great deal of combat and numerous mortar attacks. Mr. [redacted]as then honorably discharged in 1970. Almost immediately after his discharge he began to experience severe hallucinations and flashbacks about his Vietnam experiences. Because these experiences were so severe and occurred almost immediately after his discharge, he was granted service connection one year later, in 1971. Two years after this, in 1973, Mr. [redacted] was given a 30 percent rating and then one year after this he was finally increased to a total 100 percent disability rating.

The total incapacitating nature of Mr. [redacted] condition has been confirmed by both the VA and Mr. [redacted] private psychiatrists. In fact, a letter dated July 11, 1979, from the VA to Mr. [redacted]cifically stated that his total disability was permanent in nature, in fact, no future exams were scheduled thus indicating that the rating board had determined that Mr. [redacted] condition was so severe that there was no

[redacted]

likelihood of improvement. Nonetheless, nine years after Mr. [redacted]ad first received his 100 percent rating, he was called in for a review examination as part of a mass review of all Puerto Rican veterans who were rated 100 percent for the neuropsychiatric conditions. The examining physician diagnosed Mr. [redacted]s schizophrenia as being in partial remission despite the fact that his symptoms had remained the same. As a result of this diagnosis, Mr. [redacted]as reduced to 70 percent. He then decided to appeal this decision and it is this appeal which has brought us before you today.

The main point in support of Mr. [redacted] claim is that the rating board erroneously reduced his 100 percent rating to 70 percent, 38 C.F.R.--.

CHAIRMAN: If I may interrupt you on this point, are you contending that--are you in effect appealing for a retroactive assignment of a 100 percent rating, or are you maintaining that the reduction which occurred in 1984 and appealed therefrom has been continuously pursued, meaning that the--that we now have a--that the issue before us is restoration of that 100 percent rating as opposed to a claim that--a new claim that a 100 percent rating should be assigned. Do you understand what I am saying? They are really two different issues there. If you are arguing that the rating board in 1984 erred in reducing the rating, then we can only take that issue if we have an appeal that's been continuous since that rating action. If that's not your claim, then the argument should be that he is entitled currently to a 100 percent rating.

MS. SANDRIN: Well, it's a combination of both, I think.

CHAIRMAN: Well, are you saying that he has continuously prosecuted an appeal for a 100 percent rating since the rating action reducing that 100 percent?

MS. SANDRIN: Yes, he has.

CHAIRMAN: Okay, would you please proceed.

MS. SANDRIN: 38 C.F.R. 3.343(a) states that total disability ratings will not be reduced without a showing of material improvement in either a physical or mental condition. The rating board relied upon only one examination to reduce Mr. [redacted] rating and this one examination did not provide any evidence of material improvement. The examining physician, Dr. Hoias, diagnosed Mr. [redacted]as suffering from chronic undifferentiated schizophrenia in partial remission. This diagnosis, however, is not supported by Dr. Hoias' own comments. He states that Mr. [redacted]s affect is blunted, that he has little insight and that he can only handle small amounts of money and that he needs supervision. Furthermore, he adds

[redacted]

that Mr. [redacted] is only partially competent and is still suffering from ideas of reference and auditory hallucinations. These manifestations of Mr. [redacted] condition are identical to those that were described in medical and hospitalization reports from the nine years that Mr. [redacted] was considered 100 percent disabled.

The conclusion that Mr. [redacted]s condition is in partial remission is the only statement in the record that could conceivably support a rating reduction, but even this is not justified by the doctor's comments and by the other medical evidence of record. Although the statement that his condition was in partial remission is somewhat positive, it still does not provide the type of material improvement necessary to effectuate a rating reduction under 38 C.F.R. 3.343(a), especially in light of all the other evidence that was of record at the time of the reduction. Moreover, eight months after Dr. Hoias had given this diagnosis of his schizophrenia being in partial remission, he examined Mr. [redacted] again. This time Mr. [redacted] was hospitalized at the psychiatric hospital in Hato Rey, Puerto Rico. He was there for three months and during this time Dr. Hoias examined him and there was no note that his condition was in partial remission and, in fact, he stated that his condition was active and that it was worse than before. Dr. Hoias this time also added that Mr. [redacted] was obviously confused and obviously psychotic.

Clearly, his condition had not materially improved and since that time Mr [redacted] has been hospitalized numerous times for a total of almost 300 days and all of these hospitalization reports, from both his private psychiatrist and from the VA medical centers, note that he continues to hallucinate frequently, that he becomes violent and aggressive, and that he still experiences severe delusions of persecution. Because of these symptoms, Mr. [redacted] has isolated himself not only from the community but also from his family.

The most recent report which is Exhibit 21 in the brief, and is from his private psychiatrist, that's the new evidence that we have submitted today, notes that Mr. [redacted] isolates himself from his family and only talks to his wife. Dr. Font also notes that Mr. [redacted] has no friends and that he still frequently has auditory hallucinations, severe delusions of persecution and he adds that he cannot live alone, that he needs supervision and that he is unable to handle his finances. This report from July 1989 merely confirms and summarizes what the other numerous reports in the record have also stated.

A VA exam from March 1988 states that Mr [redacted] cannot engage in gainful employment. He cannot handle his own finances and he is actively hallucinating. Clearly, this is a veteran who is functioning marginally and is completely and totally disabled.

[redacted]

CHAIRMAN: May I ask you, what is the date of Exhibit 21? There is no date on it.

MS. SANDRIN: July 14, 1989, it's in the first little paragraph there. He was examined on July 14.

CHAIRMAN: And that's the date of the statement too then?

MS. SANDRIN: I believe so, but it was not signed and dated by the doctor, but we just received it a week ago. I'm assuming it's around that date. In conclusion, I would just like to reiterate that the regulations require showing of material improvement in a veteran's condition before a reduction of a total disability rating. This material improvement, however, was not shown in Mr.[redacted] condition. It was not shown by the only report considered by the Board when he was reduced. Second, the entire medical record clearly demonstrates that Mr.[redacted] condition is totally incapacitating. The only statement that Mr[redacted] condition is in partial remission has been refuted not only by the medical evidence of record, but by the doctor who made the statement. This doctor declared eight months after he had first made the statement that Mr.[redacted] was actively hallucinating and that he was worse than before. There is nothing in the record now, or was there anything of record at the time of the reduction to indicate that Mr.[redacted] condition is anything less than totally incapacitating. Therefore, we respectfully request that the Board consider all the evidence of record and grant Mr.[redacted]laim to increase his rating to a total 100 percent schedular rating effective from the date he was first reduced in 1984.

That concludes my argument, if the Board has any questions about anything of record or anything that I've stated today, I'd be happy to answer those.

CHAIRMAN: Just one question.

CHAIRMAN to Ms. Sandrin:

> Q. Our review of the record reflects that he was last examined by the Veterans Administration in, I believe, it's March 1988, is that--are you in agreement with that?
>
> A. Yes.

CHAIRMAN: That's all the questions I have. For the record, this completes the hearing in the appeal of [redacted] Medina. As is the Board's practice, we will not be entering a decision today, but we will base our decision on the--what you--the additional evidence that's been received as well as the

[redacted]

entire record. If there is nothing further then, the hearing is closed.

(HEARING ADJOURNED)

I HEREBY CERTIFY THAT THE FOREGOING ...6...
PAGES ARE TO THE BEST OF MY KNOWLEDGE AND BELIEF
A TRUE AND CORRECT HEARING TRANSCRIPT. THE LAPSED
TIME OF THIS HEARING WAS .... MINUTES.

Lorena Corbitt 9/21/89